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The ABCs of Common Law Wrongful Termination Claims in the Washington Metropolitan Region

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I. Introduction

While there are numerous statutes protecting employees, there are still many gaps. This is especially true given the at-will nature of most employment in the United States. To fill these gaps, most courts, including those of Maryland, Virginia, and the District of Columbia, created common law tort actions for wrongful discharge in violation of public policy. Though the elements of these claims are generally similar, each jurisdiction establishes important limitations that employment attorneys must understand. The available sources of public policy vary and there are many statutory remedies primed to preempt related common law tort actions. The damages available under wrongful termination do not suffer from the same caps as some statutory claims and the statute of limitations fall in terms of years instead of days. Nevertheless, some plaintiffs can still strategically benefit from bringing actions under both the common law and state or federal statutes.

This article outlines the history of the wrongful termination in violation of public policy tort, with a specific focus on Maryland, Virginia, and D.C. Following the historical background is a discussion of the elements of wrongful termination claims in those three jurisdictions, including the various potential sources of public policy. After a brief description of potential defenses, including preemption, and available damages, I conclude with practical advice and tips for litigating these types of claims.

II. History of the At-Will Doctrine and Public Policy Exception

The doctrine of at-will employment first appeared as a statement in a legal treatise by Horace C. Wood, Master and Servant § 134, 272-273 (1877). In older cases, courts frequently referred to the at-will doctrine as “Wood’s Rule.” Not long after Wood’s treatise appeared, various courts began citing the rule in his treatise. Thus, the rule quickly became accepted law. See McCullough Iron Co. v. Carpenter, 11 A. 176, 178-179 (Md. 1887) (“[Wood’s treatise] is an American authority of high repute…”); East Line and Red River Railroad v. Scott, 10 S.W. 99, 102 (Tex. 1888); Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (“…we think the rule is correctly stated by Mr. Wood, and it has been adopted in a number of states.”); Greer v. Arlington Mills Mfg. Co., 43 A. 609, 610 (Del.Super. 1899) (“Wood, in his Law of Master and Servant (§ 134), very clearly states the difference between the rule which obtains in this country and the one in England, and I can find it nowhere more intelligently and satisfactorily stated.); Harrod v. Wineman, 125 N.W. 812, 813 (Iowa 1910) (“…in this country it is held by an overwhelming weight of authority that a contract of indefinite employment may be abandoned at will by either party without incurring any liability to the other for damages. The cases are too

1 Many of the citations listed herein are taken from Ronald B. Standler’s History of At-Will Employment Law in the USA, http://www.rbs2.com/atwill.htm (2000).
numerous to justify citation…). The employment at-will doctrine is still law in the majority of states in the country.

The preference of laissez-faire capitalism and economic expansion of the Industrial Revolution arguably influenced the creation of the at-will doctrine. The new rule also afforded American courts a means by which to develop their own common law rule and reject the English rule, which held that an employment contract for an indefinite period extended for one year unless there was reasonable cause to discharge. See Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 566 (1983).

By the turn of the twentieth century, the at-will doctrine was almost universal. The Supreme Court even temporarily afforded it constitutional protection. See Adair v. United States, 208 U.S. 161 (1908) (holding unconstitutional an act passed by Congress that made it an offense for an interstate carrier to discharge an employee because of his membership in a labor organization); Coppage v. Kansas, 236 U.S. 1 (1915) (ruling that a Kansas state law that prohibited employers from forbidding employees to become or remain a member of a labor organization was unconstitutional). However, the Court retreated from this position in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (Congress was within its sphere of constitutional authority to enact the National Labor Relations Act and prevent employers from engaging in unfair labor practices.).

Since President Roosevelt’s New Deal economic programs, Government regulation in the workplace increased dramatically. Congress and state legislatures recognized the need to curtail harsh application of the at-will doctrine and stabilize labor relations. See Brockmeyer, 113 Wis. 2d at 567. Just as the United States began to understand the negative side effects and social costs of the Industrial Revolution, so would courts realize the at-will doctrine could not operate blindly and unchecked.

Eighty-two years after Wood first introduced the at-will doctrine, courts began to carve out certain exceptions to the doctrine. They permitted an action for wrongful discharge, more commonly referred to as wrongful termination, when an employer’s decision to dismiss an employee conflicted with some fundamental public policy of the state. The courts held that they should not allow an employer to benefit, at the expense of an employee, from a violation of an important public policy. The first court decision to recognize the public policy exception to the employment at-will doctrine was Petermann v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396, 174 Cal. App. 2d 184 (Cal. Ct. App. 1959). The court in Petermann held an employer cannot discharge an at-will employee because he failed to commit perjury upon its request. Doing so would promote illegal conduct and inhibit the performance of justice, neither of which serves the public good. Judge Fox opined:

The commission of perjury is unlawful (Pen. Code, § 118). It is also a crime to solicit the commission of perjury. (Pen. Code, §

While most courts name the legal cause of action as “wrongful discharge,” this article will use the synonymous term “wrongful termination.” Both terms refer to the same common law claim.
The presence of false testimony in any proceeding tends to interfere with the proper administration of public affairs and the administration of justice. *It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute...*

To hold that one’s continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs. *This is patently contrary to the public welfare. The law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered.*

*Id.* at 188-89 (emphasis added). Despite this landmark decision, the *Petermann* case stood alone and ignored for many years.

Other state courts in the United States did not begin to affirm the public policy exception to the at-will doctrine until almost two decades after the *Petermann* opinion. One of the first bases for successful wrongful termination claims was in workers’ compensation statutes. In *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249 (1973), the court held that an employee fired for exercising his statutory right to file a workmen’s compensation claim was entitled to damages. In *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172 (1978), the court stressed that Illinois’s workers’ compensation statute was a public policy of the state and would only be effective if wrongfully discharged employees could maintain a personal action for damages. *See also Sventko v. Kroger Co.*, 69 Mich.App. 644 (1976); *Brown v. Transcon Lines*, 284 Or. 597 (1978). In 1978 and 1979, Pennsylvania courts confirmed causes of action for wrongful termination for taking time off work for jury duty and for refusing to take a polygraph test. *See Reuther v. Fowler & Williams, Inc.*, 255 Pa.Super. 28, 386 A.2d 119 (1978) (at will employee fired because of taking time off from work for jury duty stated cause of action for wrongful discharge under Pennsylvania law); *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3rd Cir. 1979) (at will employee fired for refusing to take a polygraph test stated cause of action for wrongful discharge under Pennsylvania law).

Two of the most influential wrongful termination cases came out in 1980. That year, the California Supreme Court, in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980), accepted the reasoning in *Petermann* and found that an employer cannot discharge an employee for refusing to participate in an illegal scheme to fix retail gasoline prices. With language very similar to that of *Petermann*, the court held:
We hold that an employer’s authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer.

_Id._ at 178 (emphasis added). Also in 1980, the New Jersey Supreme Court wrote its landmark ruling, _Pierce v. Ortho Pharmaceutical_, 84 N.J. 58 (1980). It found that “an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy.” _Id._ at 72. With this background, it was not long until courts in and around Washington, D.C. joined the trend in confirming the public policy exception to the employment at-will doctrine.

III. Origins of Wrongful Termination Actions in Maryland, Virginia, and the District of Columbia

The first wrongful termination case in the region came up in Maryland. After providing an extensive overview of case law on the topic from around the county, the Maryland Court of Appeals adopted a new cause of action for wrongful termination in violation of public policy in _Adler v. Am. Standard Corp._ (“Adler” or “Adler I”), 291 Md. 31, 43 (1981) (hereinafter referred to as an “Adler claim”). Though the court confirmed the ability to make a wrongful termination claim in the state of Maryland, it found that the plaintiff did not meet his burden when asserting that claim. Adler reported only general and vague inadequacies in the management and operation of the company to corporate vice presidents. Chief Judge Robert C. Murphy recognized that modern economic conditions differed significantly from those that existed during the birth of the at-will doctrine. He considered:

When terminated without notice, an employee is suddenly faced with an uncertain job future and the difficult prospect of meeting continuing economic obligations. But this circumstance, of itself, hardly warrants adoption of a rule that would forbid termination of at will employees whenever the termination appeared “wrongful” to a court or a jury. _On the other hand, an at will employee’s interest in job security, particularly when continued employment is threatened not by genuine dissatisfaction with job performance but because the employee has refused to act in an unlawful manner or attempted to perform a statutorily prescribed duty, is deserving of recognition._ Equally to be considered is that the employer has an important interest in being able to discharge an at will employee whenever it would be beneficial to his business. Finally, _society as a whole has an interest in ensuring that its laws and important_
public policies are not contravened. Any modification of the at-will rule must take into account all of these interests.

Adler, 291 Md. at 41-43 (emphasis added). In defense of its ability to create a new cause of action in Maryland, the court opined that the at-will doctrine is “subject to modification by judicial decision where this Court finds that it is no longer suitable to the circumstances of our people.” Id. (citing Condore v. Prince George’s Co., 289 Md. 516 (1981); Kline v. Ansell, 287 Md. 585 (1980)). Changing circumstances compel courts to adopt new rules and create new law. See e.g., Harris v. Jones, 281 Md. 560 (1977); Deems v. Western Maryland Ry., 247 Md. 95 (1967). The developing economic and social landscape of the United States required such a change in Maryland law.

Virginia was next to recognize a cause of action for wrongful termination. With little fanfare, the Supreme Court of Virginia confirmed the public policy exception to the employment at-will doctrine in its 1985 decision of Bowman v. State Bank of Keysville, 229 Va. 534, 539 (1985) (hereinafter referred to as a “Bowman claim”). The bank and its board of directors discharged employees who exercised their rights as shareholders in questioning the manner in which the bank obtained proxies. Ruling in favor of the plaintiffs, Justice A. Christian Compton wrote, “The unique facts of these cases require us to apply one of the recognized exceptions to the rule of terminability…The courts of at least 20 states have granted exceptions to the strict application of the doctrine in favor of at-will employees who claim to have been discharged in violation of an established public policy.” Id. (citing Sheets v. Teddy’s Frosted Foods, Inc., 179 Conn. 471 (1980); Nees v. Hocks, 272 Or. 210 (1979); Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex.1985); Harless v. First National Bank in Fairmont, 162 W.Va. 116 (1978)). The court qualified that it adopted only “a narrow exception to the employment-at-will rule.” Bowman, 229 Va. at 540.

Interestingly, the U.S. District Court for the District of Columbia, not the District of Columbia Court of Appeals, first espoused the public policy exception to the at-will employment doctrine in D.C. In Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C.1981) (en banc), the Court of Appeals refused to rehear an unpublished memorandum opinion that affirmed the dismissal of an employee’s complaint. Following Taylor v. Greenway, 173 A.2d 211 (D.C.1961), and Pfeffer v. Ernst, 82 A.2d 763, 764 (D.C.1951), the panel held that either party may terminate an employment contract of indefinite duration for any reason. It refused to create an exception to this rule for terminations that violate public policy.

However, in 1986, the District Court for the District of Columbia adopted the Supreme Court of New Jersey’s decision in Pierce and held D.C. “would recognize a public policy exception to the at-will employment doctrine.” Newman v. Legal Services Corp., 628 F. Supp. 535, 539 (D.D.C. 1986). It reasoned that D.C. had “long recognized a public policy exception to a landlord’s right to evict a tenant-at-will” and that “the right to employment is as fundamental a right as the right to housing.” Id. (citing Edwards v. Habib, 397 F.2d 687 (D.C.Cir.1968), cert. denied, 393 U.S. 1016 (1969)). Two years later, in Hall v. Ford, 856 F.2d 255, 267 (D.C. Cir. 1988), the District Court found that the decision of the D.C. Court of Appeals in Ivy confirmed that the District of Columbia did not, in fact, recognize a cause of action for wrongful termination and disapproved the decision in Newman. The court held that it is “of course bound
by the law of the District of Columbia, as authoritatively interpreted by the D.C. Court of Appeals.” Hall, 856 F.2d at 267.

With the decision of Adams v. George W. Cochran & Co., Inc., 597 A.2d 28, 31 (D.C. 1991) in 1991, the D.C. Court of Appeals finally recognized a cause of action for wrongful termination. In the Adams case, the defendant wrongfully discharged the plaintiff after he refused to drive a truck that did not have an inspection sticker on its windshield. The court ruled in favor of the plaintiff. After reviewing the history of wrongful termination in other jurisdictions, including the landmark Petermann and Tameny decisions, the court determined that it should “adopt a public policy exception to the general rule that an at-will employee may not sue a former employer in tort for wrongful discharge.” Id. at 33. Similar to the Virginia Supreme Court’s decision in Bowman, the Adams court warned that there is only “a very narrow exception to the at-will doctrine” and the employee’s refusal to violate the law must be “the sole reason for the discharge.” Id. at 34.

In 1997, the D.C. Court of Appeals expanded the Adams public policy exception. See Carl v. Children’s Hosp., 702 A.2d 159 (D.C.1997) (hereinafter referred to as a “Carl claim”). In Carl, the plaintiff, a part-time nurse, alleged that her employer terminated her because she advocated for patients’ rights and against her employer’s interests before the D.C. Council and served as an expert witness in medical malpractice cases. Id. at 160. Ms. Carl did not violate any law, as Adams requires. Nevertheless, the court in Carl held that Adams did ‘not foreclose any additional ‘public policy’ exceptions to the general rule that employment contracts are always at will unless they expressly provide otherwise.” Id. at 160. Specifically:

We hold that the “very narrow exception” created in Adams should not be read in a manner that makes it impossible to recognize any additional public policy exceptions to the at-will doctrine that may warrant recognition. We think Judge Schwelb, in his concurring opinion in Gray v. Citizens Bank, [602 A.2d 1096 (D.C. 1992)], read Adams correctly: “We could not and did not hold in Adams that this was the only public policy exception, because that question was simply not presented.” Gray, supra, 602 A.2d at 1098 (Schwelb, J., concurring). Adams simply said that there is “a very narrow exception to the at-will doctrine,” 597 A.2d at 34, not “just one and only one” such exception. There is nothing in the Adams opinion that bars this court—either a three-judge panel or the court en banc—from recognizing some other public policy exception when circumstances warrant such recognition.

Id. (emphasis added). Therefore, employees in D.C. do not have to refuse to engage in illegal conduct in order to have a cause of action for wrongful termination in violation of public policy.

IV. “A” is for Adler: Elements of Wrongful Termination in Maryland

While Adler is the seminal case that confirmed a cause of action for wrongful termination in Maryland, subsequent decisions established the principal types of wrongful termination claims

### A. Refusing to Engage in Illegal Activity

The *Adler* tort protects employees terminated because he or she refused to engage in illegal activity. Cases construing this form of protected conduct include:

1. Recognizing an *Adler* claim where an employee was discharged after refusing to engage in sexual intercourse with her supervisor and thus “becom[ing] her boss’s prostitute.” *See, e.g.*, *Insignia Residential Corp. v. Ashton*, 359 Md. 560 (2000).

2. A human resources director alleging that she was terminated because she refused to submit a false insurance claim for health insurance on behalf of an individual who no longer worked for the company, an act that would amount to health care benefit fraud. *See, e.g.*, *Magee v. Dan Sources Tech.l Servs., Inc.*, 137 Md. App. 527 (2001).

3. Recognizing an *Adler* claim where a resident manager of an apartment complex was terminated because she refused to violate tenants’ constitutional right to privacy by carrying out instructions to enter tenants’ apartments and look through their private papers in their absence. *See, e.g.*, *Kessler*, 82 Md. App. 577.


### B. Exercising a Statutory Right

Terminating an employee for exercising her statutory rights can also give rise to an *Adler* claim. Cases construing this form of protected conduct include:

1. Terminating a teacher for exercising his First Amendment right by speaking out about a guard’s unnecessary use of force to stop a fight between inmates. *See, e.g.*, *De Bleecker v. Montgomery County*, 292 Md. 498 (1982).

3. Discharging an employee solely because the employee filed a worker’s compensation claim. See, e.g., Ewing, 312 Md. 45 (1998).

C. Fulfilling a Statutory Obligation

Adler protects at-will employees who fulfill a statutory obligation or reporting suspected criminal behavior to law enforcement. See Makovi v. Sherwin Williams Co., 316 Md. 603, 610-11 (1989). Under this form of protected conduct, the employee must demonstrate that she had a legal obligation or duty to report the employer’s unlawful conduct. Note that in Wholey v. Sears Roebuck, 370 Md. 38 (2002), the court cautioned against construing this form of protected conduct broadly because the legislature has not created a general whistleblower protection statute protecting employees who investigate and internally report suspected criminal activity. Cases construing this form of protected conduct include:

1. Recognizing an Adler claim where a former teacher at a childcare facility claimed she was terminated for reporting instances of child abuse to a state childcare licensing agency. See, e.g., Bleich, 98 Md. App. 123.

2. A physicist alleging that his employment was terminated because he intended to “blow the whistle” on the hospital’s practice of billing Medicare for complex radiation calculation plans when less complex and less expensive calculations were actually being performed, but who had no statutory duty to report the hospital’s billing irregularities, failed to state Adler claim. See, e.g., Thompson v. Mem’l at Easton, Md., Inc., 925 F. Supp. 400 (D. Md. 1996).

3. Employees alleging that their employer closed the plant in retaliation for their cooperation in a state and federal prosecution for the employer’s toxic waste dumping, could not maintain an Adler claim because CERCLA provides its own procedure for employees to seek relief for such retaliation. See, e.g., Miller v. Fairchild Indus., Inc., 97 Md. App. 324 (D. Md. 1987).

D. Elements of an Adler Claim

In order to establish a case of wrongful termination, the employee must prove by a preponderance of the evidence, that (1) her employer terminated her; (2) her termination violated a clear mandate of public policy; and, (3) there is a causal nexus between the employee’s conduct and the employer’s decision to fire the employee. See King, 160 Md. App.at 700; see also Wholey, 139 Md. App. at 650-51; Shapiro v. Massengill, 105 Md.App. 743, 764 (1995); Leese v. Baltimore County, 64 Md.App. 442, 468 (1985).

V. “B” is for Bowman: Elements of Wrongful Termination in Virginia
While Virginia first recognized an exception to the employment at-will doctrine in *Bowman*, the Virginia Supreme Court confirmed that the “narrow” exception applies in only three discreet circumstances in *Rowan v. Tractor Supply Co.*, 263 Va. 209 (2002)—(1) the exercise of a statutory right, (2) the violation of statutory protections, and (3) the refusal to engage in criminal conduct. Justice Lacy reasoned:

> While virtually every statute expresses a public policy of some sort, we continue to consider this exception to be a “narrow” exception and to hold that “termination of an employee in violation of the policy underlying any one [statute] does not automatically give rise to a common law cause of action for wrongful discharge.”
>
> *City of Virginia Beach v. Harris*, 259 Va. 220, 232, 523 S.E.2d 239, 245 (2000). In only three circumstances have we concluded that the claims were sufficient to constitute a common law action for wrongful discharge under the public policy exception.

*Id.* at 213 (emphasis added); see also *Rubin v. Am. Soc. of Travel Agents, Inc.*, 78 Va. Cir. 1 (Va. Cir. Ct. 2008). The first instance, as was the case in *Bowman*, is when an employer violates a policy enabling an employee’s exercise of a statutorily created right.

The second scenario that gives rise to a wrongful termination claim is when an employer violates a public policy explicitly expressed in statute and when the employee is a clear member of the class of persons the statute intends to protect. *See Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997); see also *Lockhart v. Commonwealth Education Systems Corporation*, 247 Va. 98, 439 S.E.2d 328 (1994). The Bailey and Lockhart cases involved discharges based on the public policy expressly stated in former Va. Code § 2.1-715.4 (currently codified in § 2.2-3900). That statute provided, in relevant part, that it is “the policy of the Commonwealth” to “safeguard all individuals within this Commonwealth” against unlawful discrimination in employment based on gender. The employees in these cases alleged their employer terminated them because of their gender.

The third, and final, circumstance is when an employer discharges an employee for refusing to engage in a criminal act. “Although criminal statutes do not contain explicit statements of public policy, the protection of the general public from lawless acts is an unquestioned policy underlying such statutes.” *Rowan*, 263 Va. at 214. The court recognized that allowing the employment-at-will doctrine to “serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity” would violate this most compelling public policy. *Id.* (citing *Mitchem v. Counts*, 259 Va. 179, 190 (2000)). In *Mitchem*, the court upheld the plaintiff’s wrongful termination claim based on her refusal to engage in a sexual relationship with her supervisor and violate laws against fornication and lewd and lascivious behavior. *See Va. Code §§ 18.2-344 and 345.*

There is no single case that sets out the *prima facie* elements of a wrongful termination claim under *Bowman*. However, reviewing the court decisions that followed *Bowman*, the necessary steps are the same as those in Maryland. A plaintiff must establish (1) that her employer terminated her, (2) that her termination violated a public policy of the Commonwealth
VI. “C” is for Carl: Elements of Wrongful Termination in D.C.

Though the D.C. Court of Appeals first acknowledged the existence of a cause of action for wrongful termination in Adams, most employment litigators refer to the action as a Carl claim because of the latter decision’s expansion of the narrow exception Adams created. See also Fingerhut v. Children’s Nat. Med. Ctr., 738 A.2d 799, 805 (D.C. 1999). As explained above, Carl held that an employee’s refusal to violate the law was not the only circumstance under which an employee can assert a wrongful termination claim.

As in Maryland and Virginia, D.C. courts recognize three separate categories of protected conduct under the exception to the employment at-will doctrine: (1) refusing to engage in illegal activity; (2) exercising a constitutional or statutory right; and (3) reporting criminal conduct to supervisors or outside agencies. See Fingerhut, 738 A.2d at 803. In Fingerhut, the plaintiff (1) refused to participate in his employer’s bribe of a D.C. Government official, (2) performed his legal duty as a security officer to inform government agencies of the bribe, and (3) reported the bribe to both law enforcement and internal management. The court found that all of these activities afforded Fingerhut the ability to defeat his employer’s motion to dismiss. See id. at 806-07.

The Adams and Carl decisions established the first two categories of actions. In Adams, the court held that the exception applies when an employer terminates an employee because of the employee’s refusal to violate the law. See 597 A.2d at 34. The Court of Appeals affirmed that an employee’s exercise of her right to free speech, by means of her testimony against her employer in malpractice cases, also serves as the basis of a wrongful termination claim. See Carl, 702 A.2d at 182.

When originally asked to extend the exception to the employment at-will doctrine to employees who report illegal activities, the Court of Appeals refused to recognize such an expansion. See Gray v. Citizens Bank of Washington, 602 A.2d 1096, 1096 (D.C. 1992) opinion reinstated, reh’g en banc denied, 609 A.2d 1143 (D.C. 1992). However, Carl specifically overruled the decision in Gray and held that the court is free to recognize additional public policy exceptions. See Carl, 702 A.2d at 160. In dismissing a plaintiff’s Carl claim, the court ruled in Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 884 (D.C. 1998), that the plaintiff “failed to demonstrate the existence of a legal obligation to report to her superiors the improper conduct which she claims to have observed.” The inference, therefore, is that a cause of action for wrongful termination does exist upon the showing of such a duty to report. Fingerhut confirmed this third category of claims in its decision the following year.

However, not all whistleblowing enjoys protection from retaliation under the public policy exception. See Elliott v. Healthcare Corp., 629 A.2d 6, 8 (D.C. 1993) (affirming the dismissal of a plaintiff’s claim for abusive discharge for reporting maintenance deficiencies to
corporate managers). So far, the third category of wrongful termination actions in D.C. appears to protect only the reporting of crimes and legal obligations to report such conduct.

Though there is no case on point regarding Carl claims, the D.C. Whistleblower Protection Act protects disclosures that the employee “reasonably believes” evidences one or more of the circumstances delineated in D.C. Code § 1-615.52(6)(A)-(E). Wilburn v. District of Columbia, 957 A.2d 921, 925 (D.C. 2008). Also, as with discrimination reprisal cases, it is not necessary that the employee be correct in her disclosure. It is sufficient that the disclosing employee “reasonably believes” that the disclosure is of an illegal, inappropriate, unhealthy or unsafe practice. See D.C. Code §1-615.52(6); see also Zirkle v. District of Columbia, 830 A.2d 1250, 1260 (D.C. 2003) (the determination “hinges not upon whether the order was ultimately determined to be illegal, but whether appellant reasonably believed that it was illegal.”) (citing Horton v. Department of the Navy, 66 F.3d 279, 283 (Fed. Cir. 1995). While these cases refer to statutory, rather than common law, causes of action, they are the most analogous to wrongful termination claims.

D.C. courts do not explicitly outline the elements necessary to sustain a cause of action for wrongful termination. However, by reading the numerous cases deciding such claims, the requirements are the same in D.C. as they are in the other two jurisdictions. A discharged at-will employee may sue her former employer for wrongful termination when the sole reason for the discharge is the employee’s refusal to violate the law, as expressed in a statute or municipal regulation. The burden of proof is on the employee. The claimant must demonstrate (1) that her employer discharged her employment, (2) that the discharge was a violation of public policy, and (3) that a causal relationship exists between the discharge and public policy violation. See Adams, 597 A.2d at 34; see also Bible Way Church of Our Lord Jesus Christ of Apostolic Faith of Washington, D.C. v. Beards, 680 A.2d 419, 433 (D.C. 1996).

VII. Tort v. Contract Legal Bases

Some jurisdictions analyze wrongful termination claims under a tort theory, while others base the cause of action under contract law. Most jurisdictions view the action as one in tort. The generally accepted reason for recognizing the cause of action as a tort is that the action “vindicates an otherwise civilly unremedied public policy violation.” 24 Causes of Action 2d 227 (Originally published in 2004) (citing Porterfield v. Mascari II, Inc., 374 Md. 402 (2003)).


Maryland, Virginia, and D.C. courts all recognize wrongful termination in violation of public policy as a tort action. See Adler, 291 Md. at 43; Bowman, 229 Va. at 540; Adams, 597 A.2d at 34.
VIII. Element One: Employment Contracts and Constructive Discharge

The first step in any wrongful termination action is to establish that an employer discharged an at-will employee. Both Maryland and D.C. courts acknowledge that employees who sign a collective bargaining agreement or other form of employment contract still retain the protection of the public policy exception. To varying degrees, all three jurisdictions permit injured plaintiffs to assert that their employers constructively discharged their employment in lieu of proving involuntary termination.

A. Employment Contracts

Maryland courts hold that even employees who sign an employment contract with their employer can file a wrongful termination suit. In *Ewing*, the court held that a union member subject to a collective bargaining agreement could have a wrongful termination action against his employer who terminated him for filing a workers’ compensation claim. In reaching this decision, the judge reasoned:

> The tort action as we have recognized it is not intended to reach every wrongful discharge. It is applicable only where the discharge contravenes some clear mandate of public policy. Thus, the public policy component of the tort is significant, and recognition of the availability of this cause of action to all employees, *at will and contractual*, will foster the State’s interest in deterring particularly reprehensible conduct. Moreover, it would be illogical to deny the contract employee access to the courts equal to that afforded the *at will* employee. We hold that *a cause of action for abusive discharge exists in favor of employees who serve under contract as well as those who serve at will*. 312 Md. at 49 (emphasis added). However, in that particular case, the court found that an arbitrator’s decision during the plaintiff’s union grievance preempted his ability to bring a common law tort claim. Citing *Ewing*, the Maryland Court of Appeals confirmed the availability of wrongful termination claims to union employees in *Allen v. Bethlehem Steel Corp.*, 76 Md. App. 642 (1988).

Twenty years later, the D.C. Court of Appeals followed Maryland’s lead. In *Byrd v. VOCA Corp. of Washington, D.C.*, 962 A.2d 927 (D.C. 2008), the court found the reasoning in *Ewing* persuasive. Referencing the decisions of California and Washington courts, Judge Wagner opined:

> The Maryland court’s reasoning is persuasive. Denying contract workers the public policy wrongful discharge remedy tends to “ignore [ ] the fundamental distinction between tort and contract actions.” *Smith v. Bates Technical Coll.*, 139 Wash. 2d 793, 803 (2000). The duty giving rise to the tort remedy is not derived from the covenants of contract, but rather from the *employer’s*

Byrd, 962 A.2d at 934. Maryland and D.C. courts agree that the public policy basis of the wrongful termination tort rises above any concerns in contract law. Though there may be issues with preemption depending upon the terms of the contract in question, the existence of any written agreement between an employer and employee does not automatically foreclose the possibility of a tort claim.

B. Constructive Discharge

Many states allow an employee to assert that the employer engaged in conduct that compelled the employee to resign. In such circumstances, the employee can demonstrate a constructive discharge even though the employer did not terminate the employee. Constructive discharge is one method of establishing an illegal adverse employment decision in many civil rights and other employment law claims.

1. Maryland

In Maryland, employees do not need to prove their employers involuntarily terminated their employment in order to allege wrongful termination. Constructive discharge is sufficient to satisfy the first element of the prima facie case. Evidence, for example, that the plaintiff resigned after the employer offered the choice between resignation and termination will establish the requisite discharge for a wrongful termination claim. See Kessler, 82 Md. App. at 592. However, the plaintiff will need to show that the employer intended to induce her resignation. See Beye v. Bureau of Nat. Affairs, 59 Md. App. 642 (1984). Specifically:

[Where a resignation is purportedly prompted by working conditions, the applicable standard to determine if the resignation is, in effect, a constructive discharge, is whether the employer has deliberately caused or allowed the employee’s working conditions to become so intolerable that a reasonable person in the employee’s place would have felt compelled to resign.]

Id. at 653 (emphasis added). It is the responsibility of the employee to prove constructive discharge and the employer’s intent to provoke the resignation.

2. D.C.

Involuntary termination is also not the only form of discharge in D.C. A constructive discharge will suffice to bring a tort action for wrongful termination. See Arthur Young & Co. v.
Sutherland, 631 A.2d 354 (D.C.1993) (affirming a jury verdict finding in favor of an employee’s tort claim that her constructive discharge constituted wrongful termination); see also Darrow v. Dillingham & Murphy, LLP, 902 A.2d 135, 138 (D.C. 2006).

Establishing constructive discharge before D.C. courts is less troublesome than in Maryland. Specifically, an employee need not prove the employer intended to compel the employee to resign. In D.C., “A constructive discharge occurs when the employer deliberately makes working conditions intolerable and drives the employee into an involuntary quit.” Atlantic Richfield Co. v. D.C. Comm. on Human Rights, 515 A.2d 1095, 1101 (D.C. 1986). There is, however, “no requirement that the employer intend to force the employee to leave.” Id. (citations omitted). Working conditions rise to the requisite level of intolerableness if they “would lead a reasonable person to resign.” Id. (accord, e.g., Hopkins v. Price Waterhouse, 263 U.S.App.D.C., 321, 335 (1987); Clark v. Marsh, 214 U.S.App.D.C. 350, 355 (1981)). There is also no requirement that an employee remain in an “intolerable workplace” for a particular period of time. Atlantic Richfield Co., 515 A.2d at 1101; see also Sutherland, 631 A.2d at 362.

3. Virginia


In Jones, the plaintiff alleged the defendant constructively discharged her by giving her less desirable tasks and reducing hours after she complained of unwanted sexual advances. See Jones, 35 Va.Cir. at 458-59. The court granted the defendant’s motion for summary judgment, holding that the tort of wrongful discharge in violation of Virginia public policy does not extend to constructive discharge. Id. at 460-62. The court stated:

The at-will employment relationship permits termination of services by the employer or the employee, for any reason. When the employee chooses to resign, no special rule applies. It is only when the employer actually terminates the employee in violation of some established public policy that the narrow exception is applied.

Id. at 460 (emphasis added).

However, the Virginia Supreme Court has recognized other causes of action premised upon “constructive” conduct. For example, the court created the doctrine of constructive desertion, which recognizes a ground for divorce in favor of a party even though the guilty party

With this background, Virginia state and federal courts hold that “an employee who can meet the high burden of proving a constructive discharge does have standing to pursue a *Bowman* wrongful discharge claim.” *Gochenour v. Beasley*, 47 Va. Cir. 218, 222 (1998). The Honorable Randall G. Johnson ruled in *Peyton v. United Southern Aluminum Products, Inc, et al.*, 49 Va. Cir. 187 (1999), that constructive discharge is a viable cause of action in Virginia. The Honorable Stanley P. Klein in *Behsudi*, 52 Va. Cir. at 538, also held that Virginia law should recognize wrongful constructive discharge in the workplace.

In *Behsudi*, the court cited to a Fourth Circuit case when outlining the elements of constructive discharge:

The United States Court of Appeals has recognized constructive discharge in the workplace. In *Bristow v. The Daily Press, Inc.*, 770 F.2d 1251 (4th Cir.1985), the Fourth Circuit held that “a constructive discharge occurs when ’an employer deliberately makes an employee’s working conditions intolerable and thereby forces him to quit his job.’” *Id.* at 1255 (citations omitted). In order to satisfy the Fourth Circuit test, a plaintiff must allege and prove two elements to establish a constructive discharge: (1) the deliberateness of the employer’s action; and (2) the intolerableness of the working conditions. *Bristow*, 770 F.2d at 1255. Under this test, deliberateness only exists if the employer intended to force the employee to quit. Intolerableness of working conditions is reached only when a reasonable person “in the employee’s position would have felt compelled to resign.” *Id.* (citations omitted). When the countervailing policies and authorities are fully considered, this Court finds that wrongful constructive discharge in the workplace should be recognized under Virginia law.

52 Va. Cir. at 538. In order to sustain a cause of action for wrongful constructive discharge, the *Behsudi* court held that a plaintiff must allege and prove by clear and convincing evidence: (1) that the employer’s conduct was “so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community;” and (2) that the conduct compelling the resignation violated a Virginia public policy embodied in an existing statute. *Id.* (*citing Russo v. White*, 241 Va. 23, 27 (1991); *Ruth v. Fletcher*, 237 Va. 366, 368 (1989); *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94 (1996)). The availability of constructive discharge when asserting a *Bowman* claim remains unsettled. To the extent Virginia courts accept the theory, they follow the more strict standard of requiring a showing of intent on behalf of the employer.
IX. Element Two: Sources of Public Policy

The primary analysis courts conduct on any wrongful termination claim is if the public policy violation the plaintiff alleges cites to a viable basis for the cause of action. In addition to there being various sources of public policy, each jurisdiction also establishes general limitations and requirements when pleading wrongful termination claims.

A. General Limitations and Pleading Requirements

1. Maryland

Adler defined “public policy” as a “principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.” Adler, 291 Md. at 45. In Maryland, the public policy cited in support of a cause of action for wrongful discharge must represent a “clear mandate of public policy.” See Porterfield, 374 Md. at 423. The public policy in question must be a “preexisting, unambiguous, and particularized pronouncement” that directs, prohibits, or protects the conduct in question. Porterfield v. Mascari II, Inc., 142 Md. App. 134, 140 (Md. Ct. Spec. App. 2002) aff’d, 374 Md. 402 (2003) (citing Sears, Roebuck & Co. v. Wholey, 139 Md.App. 642 (2001). In Wholey, the court explained:

A public policy must be clearly mandated to serve as a basis for a wrongful discharge action because that “limits judicial forays into the wilderness of discerning ‘public policy’ without clear direction from a legislature or regulatory source.” Milton v. IIT Research Inst., 138 F.3d 519, 523 (4th Cir.1998); see also Gaskins v. Marshall Craft Assocs., 110 Md.App. 705, 715, 678 A.2d 615 (1996) (citation omitted). “When a plaintiff fails to demonstrate that his or her grievance is anything more than a private dispute regarding the employer’s execution of normal management operating procedures, there is no cause of action for [wrongful] discharge.” Lee v. Denro, 91 Md.App. 822, 833, 605 A.2d 1017 (1992). Wholey, 139 Md. App. at 649-50 (emphasis added); see also King, 160 Md. App. at 701-03. In other words, the public policy must be a specific, discrete, written mandate and not an assumption or inference regarding the public good.

While there is no heightened pleading requirement for an Adler claim, a plaintiff must plead with specificity the public policy the employer violated by discharging the plaintiff. See Lee v Denro, 91 Md. App. 822, 836-37 (1992). “A complaint must plead with particularity the source of the public policy and the alleged violation.” Porterfield, 142 Md. App. at 140 (citing Watson, 322 Md. at 477 (1991); Lee, 91 Md.App.at 831-32).

A plaintiff must also show that her conduct advanced the public interest supported by the policy or that the defendant’s conduct impaired that interest. See Porterfield, 374 Md. 402
(termination of employee for suggesting that she may want to seek advice of counsel before responding to unfavorable work evaluation did not violate the public policy generally favoring access to counsel). However, it is unlikely that an employee must demonstrate an actual violation of public policy. The motivation behind an employee’s conduct is also irrelevant. In Lawson v. Bowie State Univ., 119 SEPT.TERM 2010, 2011 WL 3568604 (Md. Aug. 16, 2011), the Maryland Court of Appeals held that the personal motivation of a whistleblower under Md. Code Ann., State Pers. & Pens. § 5-305 is not grounds for denying whistleblower protections. See also Horton v. Dept of Navy, 66 F.3d 279 (Fed. Cir. 1995). Though Lawson refers to a specific Maryland whistleblower statute, the rationale is applicable to other similar causes of action, such as those under Adler.

While some jurisdictions have held that when the cited statute establishing a public policy does not expressly cover an employee or an employer no claim will lie, Maryland disagrees with this rule. For example, the court in Molesworth v. Brandon, 341 Md. 621 (1996), determined that an employee can maintain a claim against an employer that was too small for coverage under the Maryland Fair Employment Practices Act (“FEPA”). Exempt employers simply need not adhere to the administrative process of the Act. They are not, however, exempt from the policy announced.

In some circumstances, a plaintiff may be able to ground a claim on a public policy conferring rights on another person, not just the plaintiff personally. See Kessler, 82 Md. App. 577 (in holding that termination of apartment complex manager for refusal to “snoop” in tenants’ apartments violated public policy, court stressed that manager’s “snooping” would have violated tenants’ right to privacy under federal constitution). However, Maryland courts will not hold an employer liable when the policy identified by the plaintiff primarily benefits the defendant. See Wholey v. Sears Roebuck, 370 Md. 38 (2002) (employer discharged security supervisor for investigating suspected theft by store manager; plaintiff’s duty to protect store was to the owner, not the public). Nevertheless, only an “important” or a “strong” public policy is actionable in Maryland. For example, a public policy favoring self-defense is inadequate to support the claim of an employee discharged for fighting. See Bagwell v. Peninsula Regional Medical Center, 106 Md. App. 470 (1995).

2. Virginia

Virginia courts define “public policy” as the underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general. Therefore, the exception is not so broad as to make actionable those discharges of at-will employees that violate only private rights or interests. See Miller v. SEVAMP, Inc., 234 Va. 462, 468 (1987). In Miller, the Virginia Supreme Court held that the private rights established by the employer’s internal regulations had no impact upon any public policy. The plaintiff should attempt to show that the right asserted benefits society as a whole rather than the plaintiff individually.

Furthermore, “an employee must also be a member of the class of individuals that the specific public policy is intended to benefit in order to state a claim for wrongful termination in violation of public policy.” City of Virginia Beach v. Harris, 259 Va. 220, 233 (2000) (citing
Dray v. New Market Poultry Products, Inc., 258 Va. 187, 191 (1999)) (holding that the plaintiff police officer was attempting to use a criminal code as a shield to protect himself, not the public, from the consequences of his decision to charge his supervisor with obstruction of justice despite the captain’s order to take no further action); see also Rowan, 263 Va. 209 (the goal of the obstruction of justice penalties was not to protect individuals from intimidation, but to protect the public from a flawed legal system due to impaired prosecution of criminals).

In Dray, employee April Dray was a quality control inspector at a plant that processed and distributed poultry. Dray believed that the plant was not following proper sanitary rules and was distributing adulterated poultry. Dray informed government inspectors and was ultimately fired. Dray brought a wrongful termination claim, asserting that her employer violated the public policy underlying the Virginia Meat and Poultry Products Inspection Act. The Court held that Dray had not stated a claim for wrongful discharge because the statute in question only intended to establish an intrastate regulatory mechanism for commerce, not protect “the public good” generally. The Commonwealth’s public policy regarding inspections of meat and poultry products did not create a protected class of which Ms. Dray was a member. Dray, 258 Va. at 190 (1999)

As in Maryland, a public policy sufficient to support a claim for wrongful termination in Virginia must be clear and explicit. See Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. at 98. There is no room for courts to interpret, extrapolate, or assume the legislature’s creation of a public policy. The language of the statute in question should be unambiguous. Similarly, the plaintiff should endeavor to establish with as much specificity as possible the public policy in question and the employer’s violative conduct. See id. (employee who failed to specify statutory basis for claim that his employer wrongfully discharged him for refusing to perform auto repairs using method he believed unsafe did not state a viable claim for relief).

3. D.C.

In expanding the “very narrow” exception to the employment at-will doctrine Adams created, Carl held that future requests to recognize such exceptions should be only on a “case-by-case basis.” Carl, 702 A.2d at 164. The court ruled it would “consider seriously only those arguments that reflect a clear mandate of public policy—i.e., those that make a clear showing, based on some identifiable policy that has been ‘officially declared’ in a statute or municipal regulation, or in the Constitution, that a new exception is needed.” Id. Furthermore, there must be a “close fit” between the policy cited and the employer’s conduct at issue. See id. With that background, the court in Carl, rejected the plaintiff’s attempt to glean a public policy exception from the rules of evidence and other sources related to expert testimony in medical malpractice cases. Analogous to the decisions in Maryland and Virginia, an employee in D.C. asserting a wrongful termination claim will need to proffer a written, explicit public policy basis and demonstrate that she is logically among those the public policy purports to protect.

D.C. courts have been more lenient with regard to the pleading requirements in wrongful termination actions. There is no case that requires a plaintiff to plead the public policy an employer allegedly violated with specificity. In Freas v. Archer Services, Inc., 716 A.2d 998, 1002 (D.C. 1998), the court found that though the plaintiff did not plead a specific statutory
provision in his original complaint, “a complaint is sufficient so long as it fairly puts the defendant on notice of the claim against him.” (citing Super.Ct.Civ.R. 8(a) and (e), Scott v. District of Columbia, 493 A.2d 319, 323 (D.C.1985)). The test of sufficiency is not whether the plaintiff cited to a specific statute, but whether the she informed the defendant of the nature of her civil action. The Freas court ruled that because the defendant had the opportunity to litigate the issue raised by the public policy in question during its own motion to dismiss, it necessarily had knowledge of the public policy basis of the plaintiff’s claim. See Freas, 716 A.2d at 1002; see also Moore v. Moore, 391 A.2d 762 (D.C.1978) (“parties have impliedly contested a matter…[where] the party contesting the [matter] received actual notice of the injection of the unpleaded matters, as well as an adequate opportunity to litigate such matters and to cure any surprise from their introduction”).

B. Sources of Public Policy and Relationship with Other Statutes

Despite courts’ attempts to narrow and limit the scope of the public policy exception to the at-will doctrine, the various sources of public policy courts accept when reviewing wrongful termination claims continue to expand. As described in Adler:

Nearly 150 years ago Lord Truro set forth what has become the classical formulation of the public policy doctrine that to which we adhere in Maryland: “Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.” Egerton v. Earl Brownlow, 4 H.L.Cas. 1, 196 (1853)

…But beyond this relatively indeterminate description of the doctrine, jurists to this day have been unable to fashion a truly workable definition of public policy. Not being restricted to the conventional sources of positive law (constitutions, statutes and judicial decisions), judges are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own personal experience and intellectual capacity…Inevitably, conceptions of public policy tend to ebb and flow with the tides of public opinion, making it difficult for courts to apply the principle with any degree of certainty.

291 Md. at 44-45 (citations omitted) (emphasis added). The public policies outlined below are only a sample of the most popular and most cited sources.

1. State Statutes and Constitutions

The clearest undisputed source of public policy is state statute. State legislative and regulatory acts are the most obvious manifestations of public policy within a state. These include statutorily created rights, criminal prohibitions, and liabilities for tort violations. See
Kessler, 82 Md. App. 577. In some states, the only public policies courts recognize as sufficient to support a wrongful discharge claim are those articulated in the state’s statutes, constitution, and administrative regulations. See Wholey, 370 Md. 38.

While this is not the case in Maryland, the majority of wrongful termination cases in Maryland do cite to state statutes and regulations. See e.g., Porterfield, 374 Md. at 422-28, 433 (Md.Code (1957, 2000 Repl.Vol.), Art. 10, § 45B); Wholey, 370 Md. at 53-56 (Md.Code Art. 27, §§ 760-762 (now Crim. Law §§ 9-301 to 9-304); Ashton, 359 Md. at 573 (Md.Code Art. 27 § 15 (repealed 2001)); Molesworth, 341 Md. at 630-637 (Md. Code, Art. 49B § 14 (Fair Employment Practices Act)); Watson, 322 Md. at 482 (Md.Code (1957, 1987 Repl.Vol., 1990 Cum.Supp.) Art. 27, § 464C); Ewing, 312 Md. at 48, 50 (Maryland Code (1957, 1982 Repl.Vol.) Article 101, §§ 39A (now Labor and Employment § 9-1105)); Bleich, 98 Md.App. at 135 (Md.Code §§ 5-502(b), 5-702(1), 5-704(a) of the Family Law Article); Kessler, 82 Md.App. at 586, 587 n. 2 (Md.Code, Art. 101, § 39A(a); Montgomery County Code §§ 29-29(q); Md.Code §§ 8-301 through 8-332, 8-401 of the Real Property Article); Monoidis, 64 Md.App. at 10 (Md.Code (1957) Art. 100, § 95). Adler also protects employees who report crimes to government agencies. See Bleich, 98 Md. App. 123 (citing Md.Fam.Law Art. §§ 5-502(b), 5-702(1), 5-704(a); and COMAR 07.02.23.06D(1)(a), 07.02.23.06 D(1)(c)) (court held that a teacher’s allegations that her employer terminated her for sending a letter to the state licensing specialist to report child abuse or neglect were sufficient to support a wrongful discharge claim).

In Carl, the D.C. Court of Appeals specifically recognized that an employee could anchor a wrongful termination suit “either in the Constitution or in a statute or regulation.” 702 A.2d at 162. Applying that standard, the court concluded that Carl made a sufficient showing to justify a public policy exception based on D.C. Code § 1-224 (now codified as D.C. Code § 1-301.43), which prohibits intimidating witnesses. The Adams court cited to the municipal prohibition against operating a vehicle without a valid inspection sticker as a valid source of public policy. See 597 A.2d at 33, see also D.C. Mun. Regs. tit. 18, § 602.

The first recognition of the public policy exception to the at-will doctrine in Virginia cited to a shareholder’s statutory right to vote without coercion. See Bowman, 229 Va. 534; see also Va. Code Ann. § 13.1-32 (1950, repealed 1985). In Mitchem, the Supreme Court of Virginia upheld the plaintiff’s assertion that her employer wrongfully terminated her employment after she refused to perform sexual acts in violation of Va. Code Ann. §§ 18.2-344 and 345, which prohibit fornication and lewd and lascivious cohabitation. See Mitchem, 259 Va. 179.

2. Workers’ Compensation

Many different types of statutes may express a public policy sufficient to support a wrongful termination claim. One class of such statutes includes those that explicitly regulate the employment relationship. The clearest example is a statute that prohibits an employee’s discharge under specified circumstances, such as in retaliation for filing a workers’ compensation claim. This falls within the category of exercising a statutory right, which all three states recognize. Wrongful termination claims based on employees seeking workers’
compensation benefits were among the first wave of such actions after courts first recognized the common law tort.

In order for a Maryland plaintiff to show that she came within the ambit of the public policy protecting workers, she must show that she filed a claim for monetary benefits arising from an injury sustained during employment. See Finch v. Holladay-Tyler Printing, Inc., 322 Md. 197 (1991); see also Wholey, 370 Md. at 55. In Ewing, the Court of Appeals of Maryland ruled:

Discharging an employee solely because that employee filed a worker’s compensation claim contravenes the clear mandate of Maryland public policy. The Legislature has made a strong statement to that effect in making such conduct a criminal offense, and our perception of the magnitude of the public interest in preserving the full benefits of the worker’s compensation system to employees, and deterring employers from encroaching upon those rights, is equally strong.

312 Md. at 50 (emphasis added). However, because of the language of Maryland’s workers’ compensation statute, Md. Code Ann., Lab. & Empl. § 9-1105, an employee must prove that the sole reason for the discharge was the employee’s filing of a workers’ compensation claim. See Kern v. South Baltimore General Hosp., 66 Md. App. 441 (1986); see also Ewing, 312 Md. at 50. § 9-1105 states, in part, “An employer may not discharge a covered employee from employment solely because the covered employee files a claim for compensation under this title. (emphasis added). This is a higher standard of causation than the “motivating factor” test outlined later in this paper.

An employer’s termination of an employee for being absent from work due to a work-related injury also comes within the protection of the public policy safeguarding the right to workers’ compensation benefits. This is not the case in Maryland when the employer applies an absence-discharge policy without regard to an employee’s workers’ compensation status. See Kern, 66 Md. App. 441. When making this conclusion, the court held that “an employee’s protection from discharge in retaliation for claiming statutory benefits does not include protection for excessive absence from work due to work-related injury.” Id. at 452. Once an employee becomes disabled and is no longer qualified to perform her job duties, an employer may terminate that employee when the period of disability is not determinable. In such cases, the inability of the employee to perform assigned responsibilities, not the receipt of workers’ compensation benefits, serves as the reason behind termination.

Virginia’s workers’ compensation statute is substantially similar to Maryland’s. See e.g., Jordan v. Clay’s Rest Home, Inc., 253 Va. 185, 193 (1997). The statute reads, “No employer or person shall discharge an employee solely because the employee intends to file or has filed a claim under this title or has testified or is about to testify in any proceeding under this title.” Va. Code Ann. § 65.2-308(a). It also requires the same “sole reason” causation standard. However, unlike the Maryland statute, the Virginia Code provides employees with a private right of action in state circuit court. See Va. Code Ann. § 65.2-308(b). Consequently, a claim of retaliation for
asserting workers’ compensation rights does not fall within the gamut of a common law *Bowman* claim. *See Shaw*, 255 Va. at 543; *see also Dunn v. Bergen Brunswig Drug Co.*, 848 F. Supp. 645, 649 (E.D. Va. 1994). The Virginia legislature passed § 65.2-308 in 1991, six years after *Bowman*. While there are no cases holding that the statutory cause of action under § 65.2-308(b) preempts a common law *Bowman* claim, there is no evidence that anyone attempted to assert a wrongful termination claim based on workers’ compensation rights prior to the enactment of § 65.2-308(b).

Like Virginia, D.C. courts recognize a statutory cause of action for retaliatory discharge for filing, or attempting to file, a workers’ compensation claim. *See Abramson Associates, Inc. v. Dist. of Columbia Dept. of Employment Services*, 596 A.2d 549, 552 (D.C. 1991); *see also* D.C. Code § 32-1542 (Workers’ Compensation Act, formerly D.C. Code § 36-342). § 32-1542 subjects an employer who violates the section to “a penalty of not less than $100 or more than $1,000,” and further provides that the employee “so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination.” To establish a claim, an “employee must prove that she made or attempted to make a claim for worker’s compensation” and that her employer discharged her in retaliation for making the claim. *Lyles v. District of Columbia Dep’t of Employment Servs. (Lyles II)*, 572 A.2d 81, 83 (D.C.1990). An employee’s attempt to make a claim for benefits is neither confined to the formal filing of a worker’s compensation claim nor limited to claims for money. *See Lyles II*, 572 A.2d at 83; *Dyson v. District of Columbia Dep’t of Employment Servs.*, 566 A.2d 1065, 1067 (D.C.1989). Nevertheless, not “every act by an employee ostensibly in pursuance of compensation benefits constitutes a claim or attempted claim for compensation.” *Dyson*, 566 A.2d at 1067.

Unlike Virginia, the D.C. Court of Appeals explicitly ruled that the statutory provisions of D.C.’s Workers’ Compensation Act preclude an employee from asserting a common law wrongful termination claim under *Adams* and *Carl*. *See Nolting v. Nat’l Capital Group, Inc.*, 621 A.2d 1387, 1387 (D.C. 1993). In so holding, the *Nolting* court reasoned:

…[W]e are dealing here with a *statutory provision* which not only creates the wrong but also *contains a specific remedy to compensate the person suffering that wrong*. No such statute was involved in Adams; there was no administrative or other remedy available to the plaintiff. The injury to the plaintiff in Adams would have gone uncompensated if the court had refused to recognize a *public policy tort*. In the case *sub judice*, appellant does not stand in that same position; she is not facing a situation in which the only possibility for compensation for her claimed injury is the recognition by this court of a public policy tort expansive enough to cover her situation.

621 A.2d at 1389 (emphasis added). The issue of preclusion is outlined in more detail later in this paper.
While all three jurisdictions protect employees from retaliation for exercising their rights under state workers’ compensation laws, only Maryland permits the use of those statutes in common law tort actions for wrongful termination. Both Virginia and D.C. require plaintiffs to pursue their statutory remedies in lieu of seeking tort damages.

3. Jury Service

Courts usually predicate recognition of a wrongful discharge claim for jury service on the characterization of jury service as an important public obligation or service. See, e.g., Sheets v. Knight, 308 Or. 220 (1989). As with workers’ compensation rights, Maryland, Virginia, and D.C. have all passed statutes prohibiting employers from terminating an employee for complying with a court order to serve on a jury.

In Maryland, “An employer may not deprive an individual of employment or coerce, intimidate, or threaten to discharge an individual because the individual loses employment time in responding to a [jury] summons…or attending, or being in proximity to, a circuit court for jury service under this title.” Md. Code Ann., Cts. & Jud. Proc. § 8-501.

Va. Code Ann. § 18.2-465.1 states, “Any person who is summoned to serve on jury duty…shall neither be discharged from employment, nor have any adverse personnel action taken against him,…as a result of his absence from employment due to such jury duty.”

The statute in D.C. not only prohibits an employer from threatening or otherwise coercing an employee because the employee serves as a juror, but also provides a cause of action for the recovery of wages lost if an employer discharges an employee for serving as a jury. See D.C. Code § 11-1913.

There are no state cases in any of the three jurisdictions regarding the use of jury duty protective statutes as the public policy basis of a wrongful termination suit. The only citations to any of the statutes listed above are from federal court decisions in Virginia discussing Va. Code Ann. § 18.2-465.1.

In Sewell v. Macado’s, Inc., 2004 WL 2237074 (W.D. Va. Oct. 4, 2004), the U.S. District Court for the Western District of Virginia refused to answer the question if the jury service statute permits a claim of wrongful termination. It reasoned, “[A] federal court exercising diversity jurisdiction only is permitted to rule upon the state law as it currently exists and not to surmise or suggest its expansion.” Id. Conversely, the Eastern District of Virginia cited to § 18.2-465.1 as one of the few bases on which an employee could assert a Bowman claim. See White v. Fed. Exp. Corp., 729 F. Supp. 1536, 1549 (E.D. Va. 1990) aff’d, 939 F.2d 157 (4th Cir. 1991); Oakley v. May Dept. Stores Co., 17 F. Supp. 2d 533, 536 (E.D. Va. 1998). The U.S. Court of Appeals for the Fourth Circuit inferred its support of the theory when it affirmed a lower court decision that the plaintiff did not allege that her employer terminated her because she would be absent from work, but because her employer did not like the fact she was testifying against another employee. See Rowan, 108 F. App’x. 110, 112. While these cases are not binding on Virginia state courts, they mirror the trend across the country that, by either statute or common law, employers cannot terminate employees because of their jury service obligations.
4. Internal Policies

and Suing the Employer

In most jurisdictions, an employer’s internal policies do not rise to the level of a public policy that can form the basis of a wrongful termination claim. Even if the employer terminates an employee after a false accusation of conduct that violates company policy, the employee cannot generally challenge the termination as repugnant to public policy.

This is the state of the law in both Maryland and Virginia. In *Beery v. Maryland Medical Laboratory, Inc.*, 89 Md. App. 81 (1991), the plaintiff claimed her employer terminated her after a co-worker wrongly accused her of violating the company’s policy against theft. According to the court, even if the plaintiff had been guilty of the theft, her termination would have been appropriate. “Firing her on the basis of a fellow employee’s unsubstantiated allegations, without proof and, indeed, without fully investigating the matter, may very well have been improper—even foolish—but can hardly be said to contravene any clear mandate of public policy.” *Id.* at 94-95.

The Virginia Supreme Court similarly held that an employer’s contravention of its own rules does not violate public policy. Thus, when an employer terminates an employee for violating the employer’s rules or because she expresses a disagreement with such rules, the employer will not be liable. See *Miller*, 234 Va. 462. In *Miller*, the plaintiff appeared as a witness on behalf of an employee before an internal grievance review panel. Two weeks later, the employer terminated the plaintiff for unsatisfactory performance. The court reasoned:

In the present case, the plaintiff argues that the employer’s act in discharging her was done in retaliation for her exercise of the right given to all employees by SEVAMP’s “Personnel and Administrative Procedures” manual to file grievances and to testify freely before grievance review panels. But such a retaliatory act would impinge only upon private rights established by the employer’s internal regulations. It would have no impact upon any public policy established by existing laws for the protection of the public generally.

234 Va. At 468 (emphasis added).

There is no D.C. court decision regarding the viability of a *Carl* claim based on an employer’s own internal policies. However, given the limitation of wrongful termination claims to violations of a “clear mandate of public policy,” such as those “officially declared in a statute or municipal regulation,” there is no reason to believe D.C. courts would rule differently than their counterparts in Maryland and Virginia. *Carl*, 702 A.2d at 164.

Absent a statute expressing a clear mandate of public policy, there ordinarily is no violation when an employer discharges an at-will employee in retaliation for that employee’s suit against the employer. See *Kavanagh v. KLM Royal Dutch Airlines*, 566 F.Supp. 242
In Watson, the Court of Appeals of Maryland agreed with other states, holding, “There is no clear mandate of public policy which would make actionable Peoples’ discharge of Watson if that discharge were motivated solely by Watson’s initial claims against Peoples.” 322 Md. at 478-79. However, “a retaliatory discharge in response to an employee’s seeking legal redress against a co-worker because of assault and battery” does satisfy the requirement of a clear mandate of public policy under Adler. Id. at 483. There are no known cases in Virginia or D.C. on this issue.

5. Discrimination

No one can argue that safeguards against discrimination in the workplace reflect a valid and enforceable public policy. To this effect, Congress and the legislatures in Maryland, Virginia, and D.C. have all passed statutes prohibiting employers from discriminating against their employees. However, those same statutes provide specific relief for discriminatory and retaliatory discharges that, in many cases, preclude common law tort actions.

Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e, et seq., states that “[i]t shall be an unlawful employment practice for an employer…to discharge any individual…because of such individual’s race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. § 2000e-3 also prohibits employers from retaliating against an employee for opposing a discriminatory action or making a charge of discrimination. Congress later passed the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 621, et seq., and Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12101, et seq., to protect employees from discrimination and retaliation based on age and disability, respectively. The U.S. Equal Employment Opportunity Commission (“EEOC”), the federal agency responsible for enforcing these acts, has established administrative procedures that claimants must follow to assert their rights under these statutes.


Maryland courts hold that the source of the policy against discrimination, such as hostile work environment sexual discrimination, is statutory and “exclusively statutory.” Watson, 322 Md. at 480. The court reasoned that state statutes provide the remedies for their violation. Thus, the wrongful termination tort would not reach an employer’s retaliation if the employee based her suit on discrimination, hostile work environment, or other prohibited acts. See id. (citing Chappell v. Southern Maryland Hosp., Inc., 320 Md. 483 (1990) (ruling that the existence of
statutory federal and state remedies for discharge of an employee in retaliation for reporting allegedly illegal discrimination claims precluded tort claim for abusive discharge; Makovi, 316 Md. 603. In Makovi, the plaintiff filed a tort action for wrongful termination after receiving the EEOC’s notice of her right to sue. Makovi alleged that her employer based her dismissal on sex discrimination in violation of federal law and FEPA. The court held that the tort of wrongful termination is unavailable where a statute that carries its own remedy expresses the public policy to be vindicated. See id. at 609. Because Title VII and FEPA provided a remedy for Makovi’s alleged employment discrimination, “the generally accepted reason for recognizing the tort, that of vindicating an otherwise civilly unremedied public policy violation, [did] not apply.” Id. at 626.

Despite Makovi, the Maryland Court of Appeals “left open the prospect of an action for abusive discharge lying when the discharge violated a mandate of public policy independent of the employment discrimination laws.” Insignia, 359 Md. at 568 (emphasis added). In Insignia, the plaintiff argued her employer wrongfully terminated her employment because she refused to acquiesce to a form of quid pro quo sexual harassment that would have amounted to an act of prostitution under Maryland Code, Article 27, § 15 (2000) (now Md. Code Ann., Crim. Law § 11-301, et seq.). The court explained:

Preclusion under Makovi, we iterated, applies only when the public policy sought to be vindicated “is expressed in a statute which carries its own remedy for vindicating that public policy.” Preclusion was not mandated, however, simply because the assault and battery arose out of workplace sexual harassment. We explained that public policy, manifested in both the civil and criminal law, provided sanctions against the harmful and offensive touching of the person, whether or not sexually motivated, long before either Title VII or Art. 49B was enacted, and that, had those statutes never been enacted, that independent mandate of public policy would have supported [a plaintiff’s] recourse against the co-worker. Thus, we noted, there were “multiple sources of public policy, some within and some without Title VII and [Art. 49B]” and that, “[b]y including prior public policy against sexual assaults, the anti-discrimination statutes reinforce that policy; they do not supersede it.” [ Watson, 322 Md. at 486].

Id. at 571 (citation omitted) (emphasis added). Watson, the precursor to Ashton, similarly held that “it is contrary to a clear mandate of public policy to discharge an employee for seeking legal redress against a co-worker for workplace sexual harassment culminating in assault and battery.” 322 Md. at 480-81.

Various federal court decisions in D.C. hold that antidiscrimination laws, such as the DCHRA, can serve as the public policy basis of a common law wrongful termination claim. See MacNabb v. MacCartee, 804 F. Supp. 378, 381 (D.D.C. 1992) (citing Buttell v. American Podiatric Medical Assoc., 700 F.Supp. 592, 600 (D.D.C.1988) (“Discrimination based on age, like discrimination based on race or gender, is a violation of the clear mandates of public
policy’); Alder v. Columbia Historical Soc’y, 690 F.Supp. 9, 17 (D.D.C.1988) (‘‘[P]laintiff’s claims [of race and gender discrimination], if proven, would appear to implicate a statutorily expressed public policy,’’ thus, defendant’s motion to dismiss the wrongful discharge claim is denied)). These rulings, however, are not binding on D.C. ‘‘state’’ courts.3

Contravening the holdings of the U.S. District Court for D.C., the D.C. Court of Appeals held that the DCHRA preempts the public policy exception to the employment at-will doctrine. In Carl, the seminal case in D.C. on the common law tort, the court opined:

The Council [of D.C.], of course, has shown that it knows how to cover a field; we would be entirely off base if we were not to conclude that the Council had preempted, for example, the legal fields represented by the exhaustive list of Human Rights Act prohibitions against discrimination in employment, or the comprehensive Rental Housing Act rules governing evictions of tenants at will, or the detailed Workers Compensation Act provisions addressing on-the-job injuries.

702 A.2d at 171 (emphasis added). In McManus v. MCI Communications Corp, the court confirmed that it already rejected the argument that a wrongful termination claim does not rise when there is an alleged statutory violation. See 748 A.2d 949, 957 (D.C. 2000) (citing Freas, 716 A.2d at 1002 (‘‘there is no need to apply the Carl rationale because the legislative policy [in the statute allegedly violated] is explicit and may apply directly to [appellee’s] alleged discharge of [appellant]’’). Having previously concluded that the employer did not violate the employee’s rights under the DCHRA, the McManus court ruled there was no room to make the argument again under Carl.

Virginia court decisions mirror those of Maryland and D.C. In Doss v. Jamco, the Virginia Supreme Court held that ‘‘in amending the [VHRA] by adding subsection D to Code § 2.1-725 in 1995 [now Va. Code Ann. § 2.2-2639(D)], the General Assembly plainly manifested its intention to alter the common law rule with respect to ‘‘[c]auses of action based upon the public policies reflected in [the VHRA].’’’’ 254 Va. 362, 371 (1997). Subsection D states, ‘‘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.’’ (now § 2.2-2639(D)).

Following Doss, the court next addressed the scope of the VHRA in Conner v. National Pest Control Ass’n., 257 Va. 286, 288 (1999). There, the plaintiff alleged that she had asserted a valid cause of action for wrongful termination because, in addition to the public policy against gender discrimination in the VHRA, her employer’s conduct violated the same public policy embodied in sources other than the VHRA, such as Title VII. The court disagreed, holding that ‘‘the General Assembly eliminated a common law cause of action for wrongful termination based

3 Though D.C. is not a state, it maintains its own court of general jurisdiction, the Superior Court of D.C., and appellate court, the D.C. Court of Appeals. For issues of local, not federal, law, the D.C. Court of Appeals is the highest court and court of last resort in D.C.
on any public policy which is reflected in the VHRA, regardless of whether the policy is
articulated elsewhere.” Id. at 290. However, in line with the Ashton decision in Maryland,
Virginia courts permit wrongful termination claims related to, but not specifically covered by,
the VHRA. See Mitchem, 259 Va. 179, 185-86 (holding that an employer’s termination of an
employee for refusing to engage in a sexual relationship violated the Commonwealth’s public
policies against fornication and lewd and lascivious behavior embodied in Code §§ 18.2-344 and
345).

6. Public and Occupational Health

While safeguarding the health of the public at large should be a clear source of public
policy, court rulings on the issue are mixed. Most states, including Maryland, Virginia, and
D.C., maintain numerous statutory provisions that intend to protect the health of their residents.
Those explicit statutes can serve as the public policy basis of a wrongful termination claims.
Absent an explicit mandate, however, most courts refuse to recognize a general public policy
exception.

In Hrehorovich v. Harbor Hosp. Ctr., Inc, the Court of Special Appeals of Maryland
denied an employee’s wrongful termination claim based on the state’s interest in promoting a
health care system that provides financial and geographic access to quality health care at a
a doctor and Director of Medicine, raised concerns regarding the hospital’s refusal to pursue
certain goals of a previously expressed strategic plan, reductions in the hospital work force,
delays in X-ray and laboratory reporting, and lack of effective mechanisms for communication
between the hospital and its staff. After bringing those issues to the attention of the Medical
Executive Committee, the hospital terminated the complainant. In denying the employee’s
Adler
claim, the court found, “While a quality health care system accessible to all is undoubtedly a
desirable goal, appellant’s assertion that it represents a well-established public policy finds no
support in any specific Maryland legislation.” Id. at 797-98.

The Hrehorovich court cited primarily to Lee, 91 Md.App. 822, as the basis of its
decision. In Lee, the employer discharged the employee after the employee protested deviations
from proper testing procedures and attempts to deceive a Federal Aviation Administration
(“FAA”) inspector. The employee alleged that her termination contravened a federal public
policy of “promotion of maximum achievable safety in air transportation.” Id. at 827. The court
concluded that the employee’s dispute with her employer was private, notwithstanding her
allegation of an “amorphous public policy concern” of safety in air transportation. Id. at 837.

On July 19, 2011, the Court of Appeals of Maryland affirmed the dismissal of a wrongful
termination claim based on violations of federal regulations on drug labeling; the Federal Trade
Commission Act, 15 U.S.C. § 45(a)(1); and the Maryland Consumer Protection Act, MD Code,
alleged that Alpharma’s marketing of Kadian, a slow-release form of morphine, as compatible
with other opiates and failure to note on the drug’s label that it should not be taken with alcohol
posed a danger to public health. The Court held that the federal and local statutes and
regulations cited did not create a clear mandate of public policy.
The Consumer Protection Act...does not provide the specificity of public policy that we have required to support a wrongful discharge claim. The extent of the public policy mandate contained in the Act supports the breadth of its enforcement, but undermines its utility in the context of a wrongful discharge claim, for, as said in Wholey, “policies should be reasonably discernible from prescribed constitutional or statutory mandates,” to ensure that our decisions to extend the tort of wrongful discharge emanate solely from “clear and articulable principles of law.” 370 Md. at 52-53, 803 A.2d at 490-91.

Id. at *24. Again, the Court wanted a specific expression of public policy, not a broad or general mandate attempting to protect the public good.

Regarding occupational safety, Maryland relies upon statutory causes of action. The Maryland Occupational Safety and Health Act (“MOSHA”) promulgates state safety and health regulations in the workplace and incorporates corresponding federal regulations. Under MD Code, Labor and Employment, § 5-604(b):

An employer or other person may not discharge or otherwise discriminate against an employee because the employee: (1) files a complaint under or related to this title; (2) brings an action under this title or a proceeding under or related to this title or causes the action or proceeding to be brought; (3) has testified or will testify in an action under this title or a proceeding under or related to this title; or (4) exercises, for the employee or another, a right under this title.

An employee who believes her employer discharged or otherwise discriminated against her in violation of this act can only submit a written complaint to the Commissioner of Labor and Industry. Consequently, common law wrongful termination claims under Adler are unavailable for employees who raise occupational safety and health concerns.

Nothing in MOSHA purports to give an employee any private right of action in court for violation of a health and safety standard. Indeed, even for a violation of § 43, expressly prohibiting an employer from discharging or discriminating against employees for exercising rights under MOSHA, the remedy afforded is a complaint to the Commissioner, who alone is authorized to file an action to restrain the violation “and for other appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

82-3353 (D.Md. April 27, 1983), Judge Young held that “the exclusive remedy for a MOSHA related wrongful discharge” was under § 5-604 and that a tort action under Adler did not exist for such a discharge.

Similarly, the Virginia General Assembly provides a statutory cause of action for any employee terminated for filing a safety or health complaint. Under Va. Code § 40.1-51.2:1, regarding the safety and health of working conditions:

> No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.

See also Ligon v. County of Goochland, 279 Va. 312, 317 (2010). Under statute, an employee must first submit a complaint to the Commissioner of Labor and Industry. Only if the Commissioner refuses to issue a charge against the employer can the employee seek redress from the courts. See Va. Code § 40.1-51.2:2. Given this statutory cause of action, there is no need to rely upon Bowman and the common law tort of wrongful termination. However, there is no statute or case that specifically precludes a Bowman claim based on this section of the Virginia Code.

In D.C., health regulations without statutory remedies can serve as the basis of a Carl claim. In Washington v. Guest Services, Inc., the Court of Appeals retroactively applied the holding in Carl and overruled the Superior Court’s grant of summary judgment to the employer:

> The health and food regulations which we have cited…are expressions of a clear public policy proscribing, in the interest of public health, the preparation, service or sale of adulterated or contaminated food. Conduct that imperils the health and safety of the elderly residents of a retirement home, who, as a group, are particularly vulnerable to the kind of practice here alleged, is obviously contrary to the public policy of this jurisdiction, and Guest Services has not seriously argued the contrary.

718 A.2d 1071, 1080 (D.C. 1998) (emphasis added). The plaintiff in Washington instructed a coworker to cease spraying stainless steel cleaner in the area where the plaintiff was preparing food for the employer’s elderly residents. The plaintiff also informed her coworker that her actions were in violation of several laws and regulations.

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4 See, e.g., 23 DCMR § 2101.1 (1990) (“No person shall dispense,…prepare, [or] process…food unless it be appropriately protected from deleterious aerosol…”); 23 DCMR § 2200.2 (1990) (“No person shall work or be allowed to work in any capacity…[w]hen the person does not use hygienic work practices.”); 23 DCMR § 3010.1 (1990) ( “All food and drink shall be wholesome [and] unadulterated…”); cf. D.C.Code § 22-3416 (1996) (“No person shall sell, or cause to be sold, or offer for sale any food which is unwholesome or unfit for use.”).
this conversation and terminated the plaintiff the next day for insubordination. The court found that foreclosing such a cause of action would undermine the purposes of food and health regulations.

As in Maryland and Virginia, the Council of the District of Columbia also establishes local laws regarding occupational safety and health. Also in line with the other two jurisdictions, D.C. law prohibits employers from retaliating against employees because they filed complaints or participated in proceedings under applicable laws. See D.C. Code § 32-1117. Aggrieved employees may file retaliation complaints with the D.C. Occupational Safety and Health Commission. Employees may seek judicial review of the Commission’s decision by the D.C. Court of Appeals. Id. Though there is no case on point, D.C. courts will likely not entertain common law wrongful termination claims citing only to D.C. occupational safety and health regulations.

7. Federal Wage Claims

In general, state and federal statutes regarding minimum wage and overtime cannot serve as the basis of a wrongful termination claim. See Section X.A. below regarding preemption. However, Maryland courts recently found a small corollary to this rule.

In Chappell, 320 Md. 483, the Maryland Court of Appeals ruled that the existence of remedy under Federal Fair Labor Standards Act (“FLSA”) precluded an at-will employee from making a common law tort claim for retaliation. The court also determined that the availability of a civil remedy under the FLSA when there was no similar remedy under Maryland law also precluded the possibility of an Adler claim. See id. at 496-97; see also Magee, 137 Md. App. at 570. The Court of Special Appeals reaffirmed the Chappell decision in Shabazz v. Bob Evans Farms, Inc., 163 Md. App. 602, 623-24 (Md. Ct. Spec. App. 2005).

In a recent decision, the U.S. District Court for the District of Maryland added an interesting twist to the preemption doctrine. In Randolph v. ADT Sec. Services, Inc., 701 F. Supp. 2d 740, 748 (D. Md. 2010), the court refused to dismiss the plaintiffs’ wrongful termination claim despite their simultaneous FLSA retaliation count. Judge Chasanow opined:

Thus, it may be that, if Plaintiffs have a viable cause of action under the FLSA, the tort of abusive discharge would not be available to them. Counts I [FLSA Retaliation] and II [Wrongful Termination], then, would then be considered alternative theories of recovery.

Id. (emphasis added). While this decision does not overrule the holding that federal and state statutory remedies preclude state common law claims, under the theory of alternate pleading, it permits plaintiffs to defeat a motion to dismiss potentially preempted claims.

8. Federal Statutes and Regulations
The ability to cite to state statutes and regulations as sources of public policy is well settled and uncontroversial. Various courts recognize that federal public policy may properly form the basis for a wrongful termination suit in state court. See McNulty v. Borden, Inc., 474 F.Supp. 1111 (E.D.Pa.1979); Tameny, 27 Cal.3d 167 (1980); Harless, 162 W.Va. 116; Phipps v. Clark Oil & Refining Corp., 396 N.W.2d 588 (Minn.App.) aff’d, 408 N.W.2d 569 (Minn.1987); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo.App.1985). Maryland and D.C. courts concur. The courts in other jurisdictions, such as Virginia, do not extend the sources of public policy to include federal statutes and regulations.

Maryland federal court, in the similarly titled Adler v. Am. Standard Corp. (“Adler II”), found that federal statutes could serve as the basis for a wrongful termination claim because no Maryland state court ruled otherwise. 538 F. Supp. 572, 579 (D. Md. 1982), rev’d on other grounds Adler v. Am. Standard Corp. (“Adler III”), 830 F.2d 1303 (4th Cir. 1987) (citing Maine v. Thiboutot, 448 U.S. (1980); Martinez v. California, 444 U.S. 277 (1980)). Conversely, the U.S. Court of Appeals for the Fourth Circuit found that federal regulations do not constitute Maryland public policy for the purpose of an Adler wrongful termination claim. See Szaller v. Am. Nat. Red Cross, 293 F.3d 148 (4th Cir. 2002) (Employer did not violate a clear mandate of Maryland public policy by allegedly discharging employee for reporting alleged violations by the employer of Food and Drug Administration regulations addressing the proper collection of blood.). While these federal decisions are not binding on state courts, they are representative of the mixed decisions of the Court of Special Appeals of Maryland.

When creating the common law claim of wrongful discharge in violation of public policy, the Adler I court cited to cases that confirmed applicability of federal public policy. Specifically, the court outlined:

In Harless v. First National Bank, 246 S.E.2d 270, 275 (W.Va.1978), discharge of an at will bank employee in retaliation for the employee’s efforts to force the bank to comply with state and federal consumer credit laws was held to be actionable because the discharge contravened a “substantial public policy principle” the protection of consumers covered by the state and federal legislation.

291 Md. at 38 (emphasis added). However, the court neither outright confirmed nor denied that federal statutes constitute public policy in Maryland. It simply pointed out that it did not “confine…itselves to legislative enactments, prior judicial decisions or administrative regulations when determining the public policy of this State.” Id. at 45; see also Watson, 322 Md. at 481. This ambiguity led to some confusion between state and federal courts in Maryland. However, a review of pertinent case law leads to the conclusion that the definition of public policy does cover federal laws.

Some Maryland state courts reviewed federal statutes as the basis of a public policy exception without stating that they did, in fact, constitute a public policy of Maryland. In a footnote in Lee, the Court of Special Appeals of Maryland admitted, “We assume without
deciding that an employee can base a claim for wrongful discharge under Maryland law on an asserted violation of public policy exhibited by violation of federal statutes.” 91 Md. App. 822, 831 n. 2 (Md. Ct. Spec. App. 1992). The plaintiff argued that his employer violated federal fraud and obstruction of justice statutes, 18 U.S.C. § 1001 and § 1505. Ruling on the substance of those claims, the court found that the plaintiff did not state a claim for wrongful termination because she did not allege how her employer affirmatively attempted to silence her or persuade her to lie to an FAA inspector. See 91 Md. App. at 832; see also McIntyre v. Guild, Inc., 105 Md. App. 332, 347 (Md. Ct. Spec. App. 1995). Though the court stated that an employee could use a federal statute as the public policy basis of a wrongful termination claim, it disclaimed that it did not decide the matter and limited its assumption to a footnote. Such opinions are dicta and do not create binding precedent.

In King, the same court held that “ERISA section 510, 29 U.S.C. § 1140, provides a remedy for employees who are terminated for reporting corporate wrongdoing to the proper authorities…[and] does not provide protection for intra-employment conduct…[or] a remedy to appellant.” 160 Md. App. at 706. If ERISA, a federal statute, did not qualify as a public policy in Maryland, there would have been no need for the court to review the content of the federal statute to determine if it applied to the appellant’s assertions.

However, Maryland courts were not always so coy and subtle in expanding application of Adler to include federal public policy. In Magee, the plaintiff argued that her discharge was in retaliation for her refusal to violate the healthcare fraud provisions of 18 U.S.C. § 24 and § 1347. 137 Md. App. at 572. This federal statute makes it a crime to knowingly defraud a healthcare benefit program. Because the court found no civil remedy that would provide the plaintiff redress for adverse employment actions taken in retaliation for her complaint about healthcare benefit fraud, it held she could state a claim under the public policy exception. In response to the defendant’s argument that the federal statutes did not rise to the level of an applicable public policy, Judge Akins opined:

We disagree. This criminal statute could not be clearer; it constitutes a strong and clear public policy mandate against filing fraudulent health insurance claims. Thus, Magee’s evidence of health care benefit fraud satisfied the second “unvindicated public policy mandate” element of an abusive discharge cause of action.

Id. (emphasis added). Given these three decisions, there is sufficient support for the argument that Maryland accepts federal statutes as public policy within the state, so long as those federal statutes do not carry their own remedial measures.

Constitutional provisions and principles also provide clear public policy mandates under which a termination may be grounds for a wrongful discharge claim. See Wholey, 370 Md. at 55-56. In DeBleecker, 292 Md. 498, the Maryland Court of Appeals held that the employment at-will doctrine was inapplicable if the discharge was a result of an employee’s exercise of his constitutionally protected First Amendment rights. Similarly, the Court of Special Appeals of Maryland recognized a public policy exception based on a citizen’s right to privacy in Kessler, 82 Md.App. 577. Kessler’s employer, an apartment complex, terminated Kessler after she
refused to enter the apartments of tenants whose rent was overdue to “snoop” through private papers in search of information regarding their place of employment, wages, etc. The court held that there existed both statutory and constitutional protections against such invasions of privacy. See id. at 587.

The inability to cite to federal statute as the source of a public policy exception to the at-will doctrine is clear in Virginia. A Bowman claim must rest upon Virginia public policy, not federal statutes. See Oakley, 17 F.Supp.2d 533; McCarthy, 999 F.Supp. at 829; Doss, 492 S.E.2d at 443; Bailey, 253 Va. 121; Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94. In Bailey, the Virginia Supreme Court opined:

That contention makes interesting rhetoric, but it disregards the settled law that any narrow exception to Virginia’s employment-at-will doctrine must be based on a specific Virginia statute in which the General Assembly has established a public policy that the employer has contravened. See Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94, 98, 465 S.E.2d 806, 809 (1996); Miller v. SEVAMP, Inc., 234 Va. 462, 467-68, 362 S.E.2d 915, 918-19 (1987); Bowman v. State Bank of Keysville, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985). And, as I have said, there is no Virginia statute expressly prohibiting defendant’s conduct.

253 Va. at 127-28 (emphasis added). In Lawrence, to which Bailey cites, the court explained:

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. We also reject Brooks’ attempt to expand the narrow exception we recognized in Bowman by relying upon so-called “common law duties of the dealership.”

251 Va. at 98-99 (emphasis added). Though Bowman does not explicitly state that Virginia statutes are the only sources of public policy, the Virginia Supreme Court clarified in its subsequent decisions that Bowman’s reliance on a specific Virginia statute as the basis of the public policy exception tailored the cause of action to derive from only state laws.

Conversely, D.C. federal courts have consistently cited to federal statutes and regulations as potential sources of public policy in wrongful termination actions. In Liberatore v. Melville Corp., 168 F.3d 1326, 1328 (D.C. Cir. 1999), the U.S. Courts of Appeals for the District of Columbia Circuit reversed summary judgment in favor of the defendant on a claim where the plaintiff alleged his employer terminated him because he threatened to report the temperature
control problem in his pharmacy to the U.S. Food and Drug Administration ("FDA"). The plaintiff cited to FDA regulations at 21 C.F.R. § 210.1(b) and § 211.142(b), as well as the Food, Drug, and Cosmetic Act, 21 U.S.C. § 351. The jury subsequently found for the plaintiff. More recently, in MacIntosh v. Bldg. Owners & Managers Ass’n Int’l, 355 F. Supp. 2d 223 (D.D.C. 2005), the D.C. federal court denied the defendant’s motion to dismiss the plaintiff’s wrongful termination count that cited to the False Claims Act, 31 U.S.C. § 3729(a), as the basis of her Carl claim. The court held:

[Defendant] contends that plaintiff has not pointed to any specific statute or regulation and has thus failed to establish a “clear mandate of public policy” justifying an exception to the at-will doctrine. In response, plaintiff identifies a federal statute, the False Claims Act, 31 U.S.C. § 3729(a) (2000), that criminalizes using false records or documents to induce the Government to pay a fraudulent claim. Because plaintiff alleged that BOMA fired him for refusing to inflate BOMA’s contractor expenses, plaintiff has pointed to a clear mandate of public policy as expressed in a federal criminal statute, satisfying both the broad standard announced in Carl and the narrower rule from Adams.

355 F. Supp. 2d at 228 (emphasis added). The Superior Court of D.C. and the D.C. Court of Appeals have not addressed the issue whether federal statutes can serve as the public policy basis for a Carl claim. While there is no reason to infer that D.C. courts would not follow in the steps of its federal counterparts, D.C. local and federal courts have disagreed with each other in the past regarding the recognition of the public policy exception. Compare Ivy, 428 A.2d 831 and Newman, 628 F. Supp. at 539; see also Hall v. Ford, 856 F.2d 255, 267 (D.C. Cir. 1988). Given the expansive interpretation D.C. courts have afforded Carl, it is safe to assume, for the time being, that federal statutes and regulations qualify as sources of public policy for wrongful termination claims.

C. Other Sources

The above sections outline current case law on some of the sources of public policy for wrongful termination actions in Maryland, Virginia, and D.C. The topics above are by no means an exhaustive list of possible sources of public policy, but include the most common sources. Because the cause of action for wrongful termination in violation of public policy is a common law claim, courts can expand and reinterpret the elements and bases over time.

The Court of Appeals of Maryland confirmed this sentiment.

While it is possible that a clear mandate of public policy may exist in the absence of a constitutional, statutory, or regulatory pronouncement, this possibility “should be accepted as the basis of judicial determination, if at all, only with the utmost circumspection.” Townsend v. L.W.M. Mgmt., Inc., 64 Md.App.
55, 61-62, 494 A.2d 239 (1985) (quoting Patton v. United States, 281 U.S. 276, 306 (1930)); see also Bagwell, 106 Md.App. at 495-96, 665 A.2d 297 (“[R]ecognition of an otherwise undeclared public policy as a basis for judicial decision involves the application of a very nebulous concept to the facts of the case, a practice which should be employed sparingly, if at all.” (citations and internal quotation marks omitted)); Lee, 91 Md.App. at 831, 605 A.2d 1017 (noting that, although “Maryland appellate courts have decided several cases involving [wrongful] discharge claims since Adler, they have never found such a claim to be stated absent a discharge which violates a public policy set forth in the constitution, a statute, or the common law”)

Some of the most influential alternate sources of public policy are codes of professional ethics. New Jersey remains one of the only jurisdictions to confirm that such codes do qualify as an expression of public policy. See Pierce, 84 N.J. 58, 72 (1980). Maryland, in Makovi, recognized that a code of professional ethics could constitute a source of public policy. See 316 Md. at 561. However, the court simply stated generally that some courts have recognized a cause of action for employees fired for “refusing to violate a professional code of ethics.” Id. (citing Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931, 1937 (1983)). In Carl, the D.C. Court of Appeals held that an employer’s termination of an employee for acting in accordance with his or her personal moral beliefs does not violate public policy. See 702 A.2d 159. The court ruled that the a specific statute protecting right to testify before the legislature, not the general public policy protecting the right to speak out, provided a concrete policy supporting a wrongful termination claim. However, the court in Wallace, 715 A.2d 873, appeared to regard the Rules of Professional Conduct for members of the D.C. bar as theoretically sufficient to create an applicable public policy. The court ultimately found that no such rule required the plaintiff’s whistleblowing conduct in that case.

There are some creative avenues available to bring wrongful termination claims based on codes of professional conduct and ethics in Virginia. For example, plaintiffs can argue that Virginia’s recognition of the American Nursing Association’s (“ANA”) Code of Ethics establishes that code as a viable public policy basis for a Bowman claim. The Virginia Code, at Va. Code Ann. § 54.1-100, confirms the Commonwealth’s authority to regulate certain professions in order to protect the public interest. Nursing is an example of such a profession. Consequently, the Virginia Board of Nursing maintains the ability to revoke a nurse’s license for “practicing in a manner contrary to the standards of ethics.” See Va. Code Ann. § 54.1-3007.
The Virginia Department of Health, Public Health Nursing program recognizes the ANA Code of Ethics as a basis for its standards of practice. Therefore, the Virginia Code, at §§ 54.1-100 and 54.1-3007, along with the regulations of the Virginia Department of Health, incorporate the ANA Code of Ethics by reference. A plaintiff nurse terminated for refusing to violate the ANA Code of Ethics can use these references to support her wrongful termination claim under *Bowman*. While there is no case law on point, this theory, and similarly creative arguments, are worth testing before a judge.

X. Element Three: Standard of Causation

The standard of causation in wrongful termination claims in Maryland, Virginia, and D.C. is not overtly clear. A plaintiff can argue in all three jurisdictions that she need only demonstrate that the defendant’s public policy violation was a “motivating factor” in its decision to terminate her. However, Virginia courts provide the clearest determination that this is the proper standard. In Maryland and D.C., plaintiffs must infer the standard from other case law.

In Maryland, the plaintiff must establish that the defendant’s motivation for terminating her violated public policy. *See Porterfield*, 374 Md. 402. The Court of Special Appeals, in its decisions in *Townsend v. L.W.M. Mgmt., Inc.*, 64 Md. App. 55, 69-70 (Md. Ct. Spec. App. 1985) and *Bagwell*, 106 Md. App. at 499, held that a plaintiff must show that the reason for an employee’s discharge was “wrongful.” In *Townsend*, the court concluded that the mere reliance on the results of the polygraph test, even if the employer had wrongfully required the employee to take the test, did not violate public policy. “Even if some unlawful animus contributed to the ultimate employment decision, liability does not necessarily attach,” particularly where the decision would have been the same with or without the animus. *Brandon v. Molesworth*, 104 Md. App. 167, 194 (1995), *aff’d in part, rev’d in part*, 341 Md. 621 (1996). Put another way:

> The question is not whether discharging [the employee for his arguably improper conduct] was fair, justified, sensible, reasonable, or appropriate. Rather, the question is whether it was wrongful, i.e., whether it violated a clear mandate of public policy. Absent that type of violation, employers can discharge at-will employees for no reason or even for a bad reason.

*Shapiro*, 105 Md. App. at 769; *see also Bagwell*, 106 Md. App. at 500.

Case law regarding mixed cases and other forms of retaliatory discharge hold that the plaintiff need only show that the unlawful motive was “a motivating factor” for the discharge. *See Brandon v. Molesworth*, 104 Md. App. at 195, *aff’d in part, rev’d in part*, 341 Md. 621 (1996); *see also Magee*, 137 Md. App. at 565-66 (agreeing that the *Molesworth* standard is “motivating factor” and not “but for” causation); *Department of Natural Resources v. Heller*, 391 Md. 148, 151-52 (2006). The *Heller* court considered the burden of persuasion in an action for retaliatory discipline brought pursuant to the Maryland Whistleblower Statute. Noting the statute provided that “[t]his subtitle does not prohibit a personnel action that would have been taken regardless of a disclosure of information,” it held that “[a] whistleblower action by the employee intended to overturn a personnel action…will succeed only if the employee shows by a

Maryland courts, in a recent decision by the Court of Appeals, confirmed that, whether “mixed” or “single” cases, the correct test for determining retaliatory discharge claims is whether the protected conduct was a “motivating factor” in the discharge. *See Gasper v. Ruffin Hotel Corp. of Maryland, Inc.*, 183 Md. App. 211, 222 (Md. Ct. Spec. App. 2008) *aff’d*, 24 SEPT.TERM 2009, 2011 WL 941355 (Md. Mar. 21, 2011). The court confirmed that the *Molesworth* decision does not include a holding that a “but for” instruction is required in a retaliatory discharge case. Furthermore, the court found that a theoretical distinction between “single motive” and “mixed-motive” cases is of no consequence whatsoever. *See Gasper*, 24 SEPT.TERM 2009, 2011 WL 941355 (Md. Mar. 21, 2011). Both courts concluded:

*We believe Maryland law to be settled that a plaintiff’s burden is to prove that the exercise of his or her protected activity was a “motivating” factor in the discharge, thereby creating burden-shifting to the defendant. An instruction that imposes upon a plaintiff the burden of proving that the exercise of his or her protected activity was the “determining” factor in the discharge from employment is a misstatement of the law, and erroneous.*


Virginia courts are clearer regarding an employee’s burden in *Bowman* claims. In *Shaw*, 255 Va. at 542-43, the Virginia Supreme Court ruled:

*[A] plaintiff who asserts a cause of action for wrongful termination under *Bowman* [must] prove that the discharge occurred *because of factors* that violate Virginia’s public policy. A plaintiff is not required to prove that the employer’s improper motive was the *sole cause* of the wrongful termination.

(emphasis added) (*citing* Lockhart, 247 Va. 98, 106; *Bailey*, 253 Va. at 126-27; *Lawrence*, 251 Va. at 98. In reaching that conclusion, the court differentiated the common law claim of wrongful termination from the statutory cause of action under state workers’ compensation laws. While Va. Code § 65.2-308 specifically forbids an employer from discharging an employee “solely because the employee intends to file or has filed” a workers’ compensation claim, there is no similar requirement for common law claims.

Virginia’s common law standard of proximate causation requires a plaintiff to prove that her employer discharged her because of any combination of unlawful factors. In such cases, the common law of Virginia does not require the court to give the jury an explicit instruction setting forth “but for” language. *See Shaw*, 255 Va. At 544. More recently, in *Schmidt, et al. v. Triple Canopy, Inc.*, No. 072556, CL-2006-0009565 (Va., December 12, 2008), the Virginia Supreme
Court explained that in a common law wrongful discharge action the trial judge erred in instructing the jury that the plaintiff must prove that their former employer’s illegal motive for terminating them was the sole cause of the termination decision. Instead, plaintiffs can prevail by demonstrating by a preponderance of the evidence that the termination occurred because of factors that violate Virginia’s public policy.

In *Adams*, the Court of Appeals of D.C. held that “a discharged at-will employee may sue his or her former employer for wrongful discharge when the sole reason for the discharge is the employee’s refusal to violate the law, as expressed in a statute or municipal regulation.” 597 A.2d at 34; see also *Wallace*, 715 A.2d at 883 (emphasis added). The *Wallace* court affirmed the dismissal of an employee’s wrongful termination claim because she could not demonstrate that her employer terminated her “solely, or even substantially for engaging in conduct protected by such an exception.” 715 A.2d at 886. Wallace’s allegations that other factors—such as professional envy of her extensive credentials by colleagues, refusal to cancel her daughter’s sixth birthday party, and reporting of five categories of alleged wrongdoing—contributed to her discharge prevented her from stating a viable claim for wrongful termination. *Id.* at 885-86.

In *Carl*, however, the court upheld a complaint alleging that the employer discharged the plaintiff for two discrete reasons—testifying before the D.C. Council against tort reform and serving as an expert witness for plaintiffs in medical malpractice cases. *See Carl, supra*, 702 A.2d at 165 n. 2 (Terry, J., concurring); *id.* at 186 n. * (Schwelb, J., concurring). The court did so even though it deemed only the first of these reasons as sufficient to implicate a public policy exception. Though the *Wallace* court noted this change in judicial precedent, it refused to apply it to the case at bar. *See* 715 A.2d at 890 n. 25. Neither *Carl* nor any other subsequent decision has specifically overturned the determination in *Adams* that the employer’s violation of public policy must be the sole reason from the employee’s termination. Nevertheless, the decision in *Carl* inarguably interpreted *Adams* broadly and permitted additional public policy exceptions. *See Bowie v. Gonzales*, 433 F. Supp. 2d 24, 36 n. 7 (D.D.C. 2006). There is no reason why plaintiff’s cannot argue that the *Carl* expansion of the common law claim also broadens the strict “sole reason” standard of causation to include the opportunity to please multiple, equally valid theories regarding the employer’s motivations.

XI. Defenses

The primary defenses employers have to confront wrongful termination claims are (1) available statutory remedies preempt the employee’s common law cause of action, and (2) the employer had a separate, legitimate reason to discharge the employee.

A. Preemption by Other Statutory Remedies

As the sections on workers’ compensation, discrimination, and occupational safety and healthy above mention, employees cannot assert a common law wrongful termination claim where there is a statutory civil remedy on point. The purpose of the public policy exception is to provide employees with a cause of action where an obvious wrong may stand unpunished. Courts in all three jurisdictions confirm preemption of a wrongful termination claim where a statutory action is available. The rule in Virginia, however, is more nuanced.
Maryland courts named this preemption doctrine as the *Makovi* rule, referring to *Makovi v. Sherwin-Williams Co.*, 316 Md. 603 (1989). *Makovi*, in reviewing a case of pregnancy discrimination, held that the common law tort is “inherently limited to remedying only those discharges in violation of a clear mandate of public policy which otherwise would not be vindicated by a civil remedy.” 316 Md. at 605. Title VII and Maryland’s FEPA, not Adler, was the plaintiff’s proper cause of action. Where a statute expresses the public policy foundation for an abusive discharge claim, and that statute already contains a remedy for vindicating the public policy objectives, then judicial recognition of an abusive discharge claim is both “redundant and inappropriate.” *Fairchild Indus., Inc.*, 97 Md. App. at 338; see also *King v. Marriott Inter. Inc.*, 866 A.2d 895, 904 (Md.App. 2005) (citing Wholey, 803 A.2d at 489).

Like any rule, the *Makovi* rule is not without its exceptions. In *Makovi*, the Court of Appeals of Maryland admitted, “Sometimes the facts underlying a discharge constitute both a violation of an anti-discrimination statute and of another, more narrowly focused, statute reflecting clear public policy but providing no civil remedy.” 316 Md. at 620. For example, the court noted an Arkansas case where the plaintiff alleged her refusal to sleep with her supervisor was a refusal to engage in prostitution, which carried criminal, not civil, consequences. This was precisely the case in *Insignia*, 359 Md. 560. As outlined previously, Ashton argued that Insignia wrongfully terminated her employment because she refused to acquiesce to a form of *quid pro quo* sexual harassment that would have amounted to an act of prostitution under Md. Code Ann., Crim. Law § 11-301, *et seq*. The court explained that the *Makovi* rule does not apply when an employer violates a mandate of public policy independent from discrimination laws. Citing the decision of *Watson*, the *Insignia* court confirmed that there is no preclusion where an additional crime, such as assault and battery, arose out of workplace sexual harassment covered by statute. 322 Md. 467. Keeping with the theme, the Maryland Court of Special Appeals refer to this exception to the *Makovi* rule as the *Watson* and *Insignia* exceptions. See Magee, 137 Md. App. at 571.

The Virginia General Assembly went so far as to codify the preclusive nature of statutory remedies when employees seek common law tort claims. As mentioned previously, the Virginia General Assembly amended the VHRA in 1995 to preclude “causes of action based upon the public policies reflected in [the VHRA].” Va. Code Ann. § 2.2-2639(D). Virginia’s workers’ compensation statute includes a similar provision. Under Va. Code Ann. § 65.2-307, “The rights and remedies herein granted to an employee…shall exclude all other rights and remedies of such employee.”

However, Virginia courts have not explicitly held that the existence of statutory remedies, as a general rule, precludes the availability of a *Bowman* claim. In fact, Virginia courts have implied that the common law public policy exception is separate and independent from statutory causes of action. For example:

‘In order for the goal of the statute to be realized and the public policy fulfilled,’ the Supreme Court recognized an exception to the at-will doctrine. *Bowman*, 229 Va. at 540. Later, in *Miller v. SEVAMP, Inc.*., 234 Va. 462, 362 S.E.2d 915 (1987), the Supreme
Court of Virginia noted that Bowman applied 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.’ Miller, 234 Va. at 467-468. Indeed, the General Assembly of Virginia has enacted statutes providing a cause of action for ‘retaliatory discharge’ under specific circumstances (such as discrimination against persons with disabilities, 51.01-41 and 51.01-46; employees who file safety or health complaints, 40.1-51.2:1 and 40.1-51.2:2; and employees who make workers’ compensation claims, 65.1-40.1).


Statutes in derogation of the common law “must be strictly construed and not enlarged by construction beyond their express terms.” Chesapeake & O. Ry. Co. v. Kinzer, 206 Va. 175, 181 (1965); see also Williams v. Matthews, 248 Va. 277, 282-83 (1994); Wackwitz v. Roy, 244 Va. 60 (1992). A statutory change in the common law “is limited to that which is expressly stated in the statute or necessarily implied by its language.” Mitchem, 259 Va. at 186-87 (citing Boyd v. Commonwealth, 236 Va. 346, 349 (1988); Strother v. Lynchburg Trust & Savings Bank, 155 Va. 826, 833 (1931). Thus, “[w]hen an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule.” Boyd, 236 Va. at 349; see also Newport News v. Commonwealth, 165 Va. 635, 650 (1936). A plaintiff can theoretically argue that the existence of other statutory remedies, without explicit preclusion of common law claims, does not prevent her from bringing those common law causes of action. The same conduct or occurrence can support more than one theory of recovery. See Balzer and Assoc. v. The Lakes on 360, 250 Va. 527, 531 (1995); Fox v. Deese, 234 Va. 412 (1987); see also Va. Code § 8.01-272. In sum, Virginia courts have not ruled, outside of the explicit common law derogations in the VHRA and workers’ compensation law, whether the existence of a statutory remedy preempts a wrongful termination claim under Bowman.

Similar to the Insignia decision in Maryland, Virginia courts permit wrongful termination claims related to, but not specifically covered by, statutes like the VHRA. In Mitchem, 259 Va. at 185-86, the Virginia Supreme Court held that an employer’s termination of an employee for refusing to engage in a sexual relationship violated the Commonwealth’s public policies against fornication and lewd and lascivious behavior, embodied in Va. Code §§ 18.2-344 and 345.

Under D.C. law, the Carl exception to the at-will employment doctrine does not apply when the very statute creating the public policy already contains a “specific and significant remedy” for the aggrieved party. Kakeh v. United Planning Organization, Inc., 537 F. Supp. 2d 65 (D.D.C. 2008) (applying District of Columbia law). In Nolting, 621 A.2d at 1389, the Court of Appeals of D.C. held that an employee cannot forego established administrative remedies and obtain recovery against an employer on the tort theory of wrongful termination. The court explained:
We are dealing here with a statutory provision which not only creates the wrong but also contains a specific remedy to compensate the person suffering that wrong. No such statute was involved in Adams; there was no administrative or other remedy available to the plaintiff. The injury to the plaintiff in Adams would have gone uncompensated if the court had refused to recognize a public policy tort. In the case sub judice, appellant does not stand in that same position; she is not facing a situation in which the only possibility for compensation for her claimed injury is the recognition by this court of a public policy tort expansive enough to cover her situation.

Id. (emphasis added); see also Freas, 716 A.2d at 1002-03. The court has held that other statutes with proprietary causes of action, such as the D.C. Whistleblower Protection Act, D.C. Code § 1-615.51, et al., also preclude the creation of new public policy bases for wrongful termination claims. See Carter v. Dist. of Columbia, 980 A.2d 1217, 1225-26 (D.C. 2009).

B. Legitimate Business Reason

As with most employee protections, employers are able to defend against a wrongful termination suit by asserting they had a legitimate business reason when discharging an employee. Maryland federal court provides the most poignant discussion on this topic. Reviewing a claim of retaliatory discharge for filing a workers’ compensation claim, the U.S. District Court in Maryland held that “an employer who has mixed motives for discharging an employee may avoid liability, provided one motive is legitimate.” Ford v. Rigidply Rafters, Inc., 999 F.Supp. 647, 650 (D.Md. 1998) (interpreting Kern v. South Baltimore Gen. Hosp., 504 A.2d 1154 (Md. 1986) and citing Ayers v. ARA Health Care Serv., Inc., 918 F. Supp. 143, 149 (D.Md. 1995)).

This defense is not without limitation. An employer may not rely on two, or more, unlawful motives to subvert the prohibition against discharging an employee in violation of public policy. The federal court in Ford explained that and employer may not avoid liability for terminating an employee for mixed, but unlawful motives. See 999 F.Supp. at 649-651. The court rejected the employer’s challenge to overturn a verdict in favor of the employee because doing would absurdly “permit an employer to avoid liability in this unusual situation by terminating an employee solely for wrongful reasons.” Id. Therefore, an employer remains liable for wrongful discharge where the motives include unlawful reasons.

XII. Damages

Maryland, Virginia, and D.C. courts agree that a prevailing plaintiff in a common law wrongful termination suit may recovery economic, compensatory, and punitive damages.

While the measure of damages in an action for wrongful discharge under Adler is the employee’s salary for the remainder of the period of employment, that is not the only remedy available. See Atholwood Dev. Co. v. Houston, 179 Md. 441, 445-46 (1941). In Johnson v
Oroweat Foods Co., 785 F.2d 503 (4th Cir. 1986), the Fourth Circuit held that the terminated employee was entitled to recover expenses reasonably incurred in seeking alternative employment. In Adler, the court refused to dismiss the employee’s claim for punitive damages, thereby rejecting the employer’s argument that it would be unfair to award such damages in the same case where the underlying tort was for the first time recognized. As long as a plaintiff can support a finding of malice on behalf of the defendant, a court will permit the recovery of punitive damages. See Kessler, 82 Md. App. at 591-592. An employee must still undertake to mitigate the damages by at least attempting, in good faith, to secured subsequent employment. See Atholwood, 179 Md. at 445-46.


As we stated in Bowman, the common law cause of action for wrongful termination of employment sounds in tort. 229 Va. at 540, 331 S.E.2d at 801; see Bailey, 253 Va. at 125…; Lockhart, 247 Va. at 105… Titan conceded in the district court that this cause of action is an intentional tort. When a plaintiff pleads and proves an intentional tort under the common law of Virginia, the trier of fact may award punitive damages. Foreign Mission Bd. v. Wade, 242 Va. 234, 241…(1991); see Kamlar Corp. v. Haley, 224 Va. 699, 706-07…(1983). Thus, we conclude that, under Virginia law, Shaw was entitled to recover punitive damages in the present action, and we answer the second certified question in the affirmative.

255 Va. at 545 (emphasis added). As in Maryland, punitive (or exemplary) damages are allowable only where there is malice on the part of the defendant. Where the aggrieved injury is “free from fraud, malice, oppression, or other special aggravation, compensatory damages only are allowed.” Burruss v. Hines, 94 Va. 413 (1897) (citing Norfolk & W.R. Co. v. Neely, 91 Va. 539 (1895)).

Similarly, D.C. courts may award lost pay, compensatory damages, and punitive damages to a prevailing employee under a claim of wrongful discharge in violation of public policy. See Adams, 597 A.2d at 34. To receive punitive damages, a plaintiff must prove the defendant’s malicious intent by clear and convincing evidence:

To sustain an award of punitive damages, a plaintiff must prove, by a preponderance of the evidence, that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent.

XIII. Practical Advice and Conclusion

A. Review Civil and Criminal Statutes

Many state and local legislatures have passed civil statutes protecting employees from unlawful discrimination, retaliation, and termination. Given the general rule that civil statutes with their own causes of action preempt common law wrongful termination claims, it is essential to review state and federal statutes before bringing a tort claim. One of the best ways to avoid a preclusion issue is to find a criminal statute on point, such as criminal prohibitions on prostitution and lewd behavior. See e.g., Insignia, 359 Md. 560; Mitchem, 259 Va. 179. Rarely do criminal statutes include civil causes of action, and rarely will a court find that a criminal statute does not espouse a public policy of the state.

B. Framing the Cause of Action


C. Forum Selection

Employees generally obtain higher verdicts in state court and are more likely to survive summary judgment in state court. In addition, federal courts, including the Fourth Circuit, often construe wrongful termination claims more narrowly than state courts. Accordingly, state court is the preferred forum for litigating an Adler, Bowman, or Carl claim.

D. Discovery

In discovery, plaintiff should focus on developing evidence on the following issues:

1. Direct evidence of retaliatory motive, such as an admission that the decision-maker was angry at the employee for engaging in protected conduct.

2. Close temporal proximity between the employee’s protected conduct and the decision to terminate the employee.

3. Deviation from company policy or practice, such as singling out the employee for extraordinary disciplinary action. For example, if the employer disciplined the employee for sending an innocuous email to his spouse letting her know that he is working late, and the company has not disciplined other employees for sending inappropriate emails, the disciplinary action taken against the employee will provide evidence of disparate treatment.

5. Animus for the employee’s protected conduct. For example, the high cost to the employer of complying with the law or regulation implicated by the employee suggests employer animus. Conversely, develop evidence on the revenue that the employer generated or expected to generate by engaging in a fraudulent scheme about which the employee complained.

6. Falsity of the employer’s alleged business justification for the discharge, showing pretext.

7. Evidence of unusual efforts by a senior manager or officer to retaliate against the employee. For example, if a senior officer who is not responsible for evaluating the employee’s performance and who typically does not evaluate the performance of such employees, it would be very suspicious if the senior officer spends time papering the personnel file of the employee to create a justification for terminating the employee. It is also the type of conduct that may demonstrate malice.

E. Maximizing Damages

The employer’s animus toward the employee’s protected activity is a strong indication of malice. Similarly, evidence that the employer deviated from policies or protocols in terminating the employee can help prove malice.

To obtain substantial punitive damages, it is critical to focus on what it would cost to deter the employer from violating the public policy. For example, requiring an employer to merely paying a discharged employee lost wages will not deter an employer who terminates an employee for reporting the discharge of toxic waste into public waterways. Instead, requiring the employer to pay the cost of cleaning up the pollution it caused would have a greater deterring effect.

The plaintiff’s evidence of damages should be as detailed as the evidence of the employer’s liability. For example, a plaintiff should proffer detailed evidence of the basis for calculating lost wages and benefits, and should offer detailed testimony from friends and family of the plaintiff describing how the wrongful discharge affected the plaintiff.

F. Employee Attributes that Strengthen a Wrongful Discharge Claim

Before choosing to represent the terminated employee, know the attributes that defense counsel fear most:

1. A long-term employee (more than nine (9) years) with a satisfactory or better performance record and at least some prior expertise in the public policy basis of her complaint.
2. An employee who discloses wrongdoing in a timely manner using the employer’s established complaint protocol in a non-contumacious manner.

3. An employee who is not complicit in her employer’s wrongdoing.

4. An employee who objects about a matter of public concern (e.g., a matter relating to public health or safety).

5. An employee who cooperates fully in her employer’s investigation of her disclosure.

6. An employee who the employer terminates within six (6) months of her protected disclosure, exercise of a statutory right, or refusal to engage in an illegal act.

G. Selecting a Theme

Before trying the case, be prepared to answer the core question in the minds of jurors: why does the plaintiff deserve relief? Keep the focus on the employer’s conduct and make the jury understand why your client found it necessary to object to the employer’s behavior. Emphasize the public interest aspect of the case. For example, if your client refused to follow orders to sell contaminated food, focus on the employer’s callous disregard for public safety. The employer’s motive for terminating plaintiff is not just a core legal element; it is also a core focus of the plaintiff’s trial presentation.

In selecting and developing your theme, the following guidelines set forth in Charles L. Belcon’s *Alta’s Litigating Tort Cases* § 12:10 (2008) are useful:

1. Does the theme summarize the “story”? 

2. Does it have factual as well as emotional appeal? 

3. Does it paint a visual image for the jury? 

4. Does it blend with the life experiences, values, and perceptions of jurors? 

5. Does it apply classical rhetorical principles of ethos, pathos, and logos? 

6. Does it guide the jurors’ decision-making process? 

7. Is it consistent with the applicable legal instructions? 

8. Does it point out the injustice in the case and allow the jurors to view a victory for the client as somehow advancing community interests? 

9. Does the theme have universal application?

I. Conclusion

*Adler, Bowman,* and *Carl* claims provide a fertile ground for discharged employees to hold employers accountable for terminations that violate a clear mandate of public policy, including the opportunity to recover substantial punitive damages. This amorphous, yet potent, tort provides a powerful tool to employees that should enable plaintiffs to continue to obtain high verdicts against employers who violate a clear mandate of public policy in terminating employees.