

MARYLAND STATE BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
NEWSLETTER

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Albert W. Palewicz, *Editor*
Jonathan R. Topazian, *Co-Editor*

Section Officers:

Glendora C. Hughes, *Chair*
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Thomas J. Gagliardo, *Recording Secretary*



FROM THE CHAIR

By Glendora C. Hughes

My first year as Section Chair is near completion. I and the Section Council have been working hard to bring you, the membership, helpful and interesting programs this past year. In addition, we have continued the high level of quality that has exemplified this outstanding newsletter. I, therefore, want to thank all of the newsletter sponsors and writers of this past year for their time, effort and excellent contribution of interesting and well written articles. I especially want to acknowledge Al Palewicz, Esq. the newsletter's editor who continues to do a great job in seeing that it is written and published on time. In my humble opinion, our Section has one of the better newsletters being published for section members.

My thanks also go out to Mary Elizabeth Palmer, Chief Administrative Law Judge for the EEOC and a Section Council member, for coordinating the open forum brown bag lunch with the EEOC Administrative Law Judges held on Thursday, May 17, 2007. Over forty participants attended and engaged in a lively discussion with the judges on everything from procedures to the individual styles of the judges in handling cases. I also want to acknowledge the excellent job that Section Council member, Darrell R. VanDuesen, Esq. did as program chair for the MICPEL sponsored Employment Law Institute held on Thursday, May 3, 2007 in Columbia. The institute provided excellent instructors and topics for new and experienced employment law attorneys.

I want to invite each and every Section member to join us at the JOINT/BENCH BAR CONFERENCE in Ocean City. As a reminder, the Section will be sponsoring a breakfast followed by an outstanding program entitled "Attorneys Fees Issues in Employment Litigation: A Comparison of Federal and State Approaches", on Friday, June 15, 2007, 8 – 10:30 am. Program Chairs are Tom Gagliardo, Esq. and Al Palewicz, Esq. The Chairs, with the significant assistance of Section Council member James Hammerschmidt, have put together an outstanding program with a superb panel. So sign up for the breakfast and the opportunity to interact with a panel consisting of the Honor-

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EDITOR'S CORNER

By Albert Palewicz

For those of you reading this in Ocean City, welcome to the MSBA Joint Bench-Bar Annual Meeting. The Newsletter you are holding is the latest edition of what has been a story of great success for the Section of Labor and Employment Law for more than ten years. Each quarter, the Section publishes a newsletter edition prepared by members of the Section, often at great cost of time and inconvenience to themselves, but always of timely and significant interest to the Section members.

Most often an issue is sponsored and produced by a law firm practicing in the areas of labor and/or employment law, or by federal, state, or local agencies whose work deals with the same areas. This issue, however, is produced by members of the Maryland Employment Lawyers Association, a group of attorneys employed in firm or solo practices, all of whom represent the plaintiff side of employment or labor law. The issue was coordinated by Katie Atkinson of the Law Offices of Gary Gilbert in Silver Spring, MD and by Tom Gagliardo, of Silver Spring, MD. Tom is a member of the Section Council, currently serving as Recording Secretary. Both Katie and Tom spent many hours recruiting and following up on those who agreed to write articles for this edition. Their work, coordinators and authors alike, is reflected very creditably in this issue. It ranges from a summary of employment discrimination processes in the various jurisdictions found in the state of Maryland, to a summary of arbitration cases decided in various courts affecting Maryland employers and employees, along with a number of excellent articles about the development of particular aspects of the law in Maryland cases during the recent past. We extend them the Section's thanks for their efforts.

The next issue will be sponsored by Saul Ewing LLP, in Baltimore, with Harriet Cooperman as coordinator of the issue. We look forward to their work.

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FROM THE CHAIR (continued)

able William Connelly, United States District Court for the District of Maryland, the Honorable Michael Mason, Montgomery County Circuit Court, the Honorable Joseph F. Murphy, Chief Judge Court of Special Appeals of Maryland, Leizer Goldsmith, Esq. and Jonathan Puth, Esq.

On October 1, 2007, the new amendments to Article 49B will go into effect. The amendments will enhance remedies for employment discrimination and provide for a private right of action. The Maryland Commission will be promulgating new regulations between now and October to address these new changes. In conjunction with MICPEL, the Section will be presenting in the fall, a program on employment law agencies which will include a presentation on the new amendments.

In closing, I want to mention two new developments hot off the press. The Supreme Court just issued a decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, with a 5-4 vote, that held an employee claiming illegal pay discrimination based on gender must file an EEOC complaint within 180 days of the original "discrete" discriminatory act. This is a favorable decision for the defense bar. On the plaintiff's side, EEOC has recently announced that it may develop guidelines to address the growing issue of "family responsibility discrimination" (FRD). Plaintiff's attorneys have been bringing FRD claims under Title VII, the Pregnancy Discrimination Act and the Family and Medical Leave Act (FMLA). Stay tuned for more discussion about these recent developments in employment law. There is never a dull moment.



This Maryland State Bar Association Newsletter is not intended to provide legal advice, but rather to provide information concerning recent developments in the field of labor and employment law. Questions concerning individual problems or claims should be addressed to legal counsel. Any opinions expressed herein are solely those of the authors, and are not those of the Maryland State Bar Association. Finally, the articles contained herein are copyrighted, all rights reserved by the respective authors and/or their law firms, companies or organizations.



EDITOR'S CORNER (continued)

Over the past months a number of section members have asked whether we could publish information about trial decisions, so that members could contact those involved to discuss the cases with them. We will begin in the next issue to publish this information, provided attorneys for both sides agree that the information be published. The notice will include only the barest of details about the trials, but will allow those members who might be interested to contact the attorneys involved to learn more about the cases. If you have a case you wish included in this Notice section, please send me the following information:

Court involved, Judge's name, Plaintiff and Defendant names, cause(s) of action dealt with, type of trial (bench or jury), remedies claimed, damages or compensation ordered, including attorney's fees.

If this works for the membership we will continue the program, publishing in each issue all the notices we receive that meet the criterion that the attorneys involved agree to publication of the information.

Again addressing those who read this at the Annual Meeting, the Chair and the Section Council urge those of you not yet members to consider joining the Section of Labor and Employment Law. We look forward to your contributions to the Section, and we are certain you will appreciate the benefits of Section membership.



FAIR LABOR STANDARDS ACT CLAIMS UPHELD BY FOURTH CIRCUIT

By: Thomas Gagliardo

The Fourth Circuit Court of Appeals has upheld an award of more than one-half million dollars, including more than \$150,000 in liquidated damages, to employees of Baltimore nonprofit community living centers. Suit had been initiated by the U.S. Department of Labor. *Chao v. SelfPride Incorporated, et al.* (Docket No. 06-1203 by unpublished *per curiam* opinion; decided May 17, 2007; and argued before Chief Judge Wilkins and Circuit Judges Niemeyer and Michael.)

Three significant issues were raised on appeal: (1) whether the nonmoving party's affidavits containing conclusory denials created a genuine factual dispute; (2) whether it was proper to award an average amount of unpaid wages when complete pay records were unavailable; and (3) whether continuing a pay practice after notice by the Department of Labor that the Fair Labor Standards Act was being violated is sufficient to establish willful violations. The District Court's finding that the corporation's chief executive officer was an employer within the meaning of 29 U.S.C. §203(a) and as such was personally liable, as well, was not challenged on appeal.

In affirming the District Court in all regards (Docket No. 1:03-cv-03409, Bennett, J.) the Court of Appeals found that the nonmoving parties' affidavits did not create a genuine factual dispute, averaging unpaid wages was proper in the absence of complete pay records, and given the totality of circumstances, primarily several years of government inaction after alerting the employer that the FLSA was being violated, it was proper to conclude that the employer did not willfully violate the Act.

SelfPride provides 24-hour residential care for disabled individuals, who for the most part require constant care and attention. Employees are required "to check on residents every two hours around the clock, including weekends." Employees submit time sheets which may be modified by supervisors before they are approved for payment. A weekend shift is 48 hours long, including two four-hour "breaks", and employees are paid for 40 hours, i.e., the eight hours designated for breaks are unpaid.

Finding that employees cannot leave the facility where they work during the breaks and are often required to continue to provide services to residents during such time, the District Court granted the Secretary's motion for partial summary judgment on liability. It also found that SelfPride had otherwise underpaid employees, violated record keeping requirements, that actual and liquidated damages were available to plaintiffs and that the corporation's CEO was an employer within the meaning of the Act and was therefore personally liable.

In support of her motion the Secretary filed 34 affidavits by employees and their time sheets to show, among other things, that they often worked alone, were rarely able to sleep during the 48-hour weekend shift, that there were limited or no sleeping facilities, that breaks were often missed because of residents' needs, that failure to call in to the central office every hour resulted in being docked pay and that they could rarely, if ever, leave the facility during break periods.

"These affidavits demonstrated in effect that the entire 48 hours of the weekend shift constituted 'work' within the meaning of the FLSA, because the 'break' time was corrupted by duties carried out for SelfPride's benefit, not for the employees' benefit."

In opposition SelfPride submitted affidavits from its chief executive officer and its facilities supervisor both to the same effect. No fact asserted by the employees was challenged specifically. Instead the CEO's affidavit asserted "conclusorily and generally that no employee worked continuously for 48 hours, because that 'would be physically impossible.' The schedule, according to the CEO, consisted of two 24-hour periods, during which 'each such employee was scheduled to be paid for eight hours of work, " for a sleep period or sleep break of eight hours [and] an additional four hour break, and was given yet another break of four hours that was not compensated." Thus, she asserted, for each day of the weekend, each employee was paid for 20 hours, even though she only had to work 8."

Finding that a number of violations were "readily apparent from the face of the time sheets . . . approved and signed by SelfPride supervisors" and that the CEO had admitted in her deposition that employees could not leave during break time, the Appeals Court agreed with the District Court's finding that no genuine dispute was created by the CEO's affidavit.

SelfPride next asserted that: (1) the Secretary "failed to create a 'just and reasonable' inference' of damages because [she] relied on paper records, rather than calling the employees as witnesses . . . and the paper records were insufficient to support . . . [a] finding of damages"; and (2) "the court erred in assuming that the illegal deductions made on the representative plaintiffs' time sheets were also to be applied to the other employees' time sheets."

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SURVEY OF RECENT ARBITRATION LAW OPINIONS IMPACTING MARYLAND EMPLOYMENT PRACTITIONERS

By: Julie C. Janofsky

Because time and pay records were in many instances missing, the Secretary's burden was to show a "just and reasonable inference of damages," after which the burden shifts to the employer to show that the damages were not suffered. Every available record was examined and "statistical inferences [were employed] to reconstruct the amount of time for which the employee was not paid." If there were enough time sheets available to determine an average for an employee that average "was then imputed to all the time sheets missing for that particular employee. For employees without sufficient time sheets to create an individual average, the Secretary used a 'universal average'."

The Appeals Court rejected the argument that having used the best available evidence, the Secretary was nonetheless required to call employees to give their "best recollection of work over a period of two years"; and reasserted that the Secretary is not required to "identify with specificity each and every employee who was undercompensated and for exactly what time period."

The Court also rejected the Secretary's argument that because on a prior occasion a Department of Labor investigator had informed Self Pride that its practices violated the FLSA the violations were willful. When violations are willful the statute of limitations is three years, otherwise it is two.

In 1998 a USDOL investigator told Self Pride that not paying for breaks violated the FLSA, in response to which Self Pride expressed disagreement. While there was a follow up call seven months later, the Court noted that there was no discussion of which provisions of the law might have been violated, examples of violations were not provided, and how a violation could be corrected was not explained. Nothing more happened for two and one-half years, when another investigation was made, leading to the litigation at hand.

Finding "no clear error" by the District Court, the Fourth Circuit reasoned that it "could have [been] fairly concluded that Self Pride . . . had a good faith disagreement with the Department of Labor about their legal obligations; or that they reasonably interpreted the investigator's departure and absence for several years as a sign that their practices were legal; or that . . . though neglectful in learning their legal obligations, [Self Pride] was not reckless . . ."

While unpublished opinions are not binding precedent in the Fourth Circuit, this decision concisely and clearly discusses frequently occurring scenarios in FLSA litigation; and the discussion regarding what is sufficient to genuinely dispute material facts when opposing summary judgment is, of course, applicable to all litigation scenarios. A full text of the decision is available at: www.pacer.ca4.uscourts.gov/opinion.pdf/061203.U.pdf.

A large crop of arbitration law decisions were issued in 2006 and the first part of 2007, in MD state and federal courts at every level, and also in the Supreme Court. While some of these cases directly involved employer-employee disputes, other arbitration law decisions in the commercial law arena are noteworthy for Maryland employment practitioners because they could impact employment arbitration law.

U.S. Supreme Court

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) - This case resolved an important arbitrability issue, holding a claim that a contract containing an arbitration clause was void for illegality must be determined by the arbitrator, not the court. Unless a challenge is made to the validity of the contract's arbitration clause itself, the issue of the contract's validity must be considered by the arbitrator first. (Although the challenge in this case was to a purportedly usurious contract, the rationale for the arbitrator's authority would extend to other areas, including employment agreements).

Maryland Appellate Courts

Doyle v. Finance America, ___ Md.App. ___, 2007 WL 765211 (March 15, 2007) - This case involved a dispute over a mortgage loan, where arbitration of disputes between mortgagors and mortgagee was mandatory because of a loan agreement which provided that "any dispute shall be resolved" at the option of either side by arbitration. The Court of Special Appeals held that when suit was filed in the circuit court, the side seeking arbitration was not required to first request arbitration from the other side before obtaining a court order from the circuit court compelling arbitration.

Koons Ford of Baltimore, Inc. v. Lobach, ___ Md. ___, 2007 WL 817225 (March 20, 2007) - Where Congress expressed an intent to preclude binding arbitration when it enacted a remedial statute, a party may not be forced to resolve a claim through an arbitration agreement. Although this case interpreted the Magnuson-Moss Warranty Act in a defective motor vehicle sales situation, it remains to be seen what applicability this concept may have to statutory claims in the employment arena.

Harby v. Wachovia Bank, 172 Md. App. 462 (2007) - A bank customer, by signing an "Access Agreement" agreed to be bound by the terms and conditions set forth in a separate "Deposit Agreement," which included an arbitration clause, and thus the customer accepted the arbitration clause even though the "Access Agreement" did not specifically identify arbitration as one of the terms to which the customer was agreeing. Query whether the logic of this case is limited to the commercial context, or whether it will be extended into the employment context.

Prince George's County v. Fraternal Order of Police, 172 Md.App. 295 (2007). Prince George's County petitioned to vacate an arbitration award in favor of the police union, and the circuit court affirmed the arbitration award. The Court of Special Appeals held that when an arbitration award is attacked on the ground that the parties did not agree to arbitrate the issue at hand, the court must review *de novo* the arbitrator's decision as to arbitrability, and the review should include an independent assessment of the evidence. In this case, a dispute between the police union and the county regarding a new promotion system fell within the arbitration clause of the collective bargaining agreement, and both the trial court and the Court of Special Appeals refused to vacate the arbitrator's decision because it was not "completely irrational." The Court of Special Appeals ultimately dismissed the county's appeal as moot due to the expiration of the collective bargaining agreement. The case contains a comprehensive review of Maryland state law regarding the standard for vacating an arbitration award.

Holloman v. Circuit City Stores, Inc., 391 Md. 580 (2006) - An arbitration agreement, under which the employer was required to provide 30 days' notice prior to any modification, and which only permitted modification on a single day of the year, was not void as illusory because the employer did not have unfettered discretion to alter or rescind the agreement unilaterally without notice.

U.S. Court of Appeals for the Fourth Circuit

Washington Metropolitan Area Transit Authority v. Local 2, Office Professional Employees International Union, 465 F.3d 151 (4th Cir. 2006) - (1) Where the parties had not agreed to submit the question of arbitrability to the arbitrator, question of whether transit authority's closing of an employee cafeteria was subject to arbitration with employees' union was subject to *de novo* review; and (2) transit authority's decision to close employee cafeteria was not a core managerial decision, but was rather a decision to terminate a longstanding and significant employee benefit and thus was subject to arbitration under the collective bargaining agreement.

Patten v. Signator Insurance Agency, 441 F.3d 230 (4th Cir. 2006) - The Fourth Circuit reversed a decision by the U.S. District Court

for the District of Maryland (Legg, J.) which had denied a motion by a terminated employee to vacate an arbitration award in favor of his former employer. The arbitration award dismissed as time-barred the employee's wrongful termination and age discrimination claims. The Fourth Circuit held that the arbitrator acted in manifest disregard of the law by implying a one year limitations period into the parties' employment agreement, and then granting summary judgment for the employer without a hearing. This case contains a good discussion on the law regarding the standard for vacating an arbitration award.

American Bankers Insurance Group v. Long, 453 F.3d 623 (4th Cir. 2006) - In a commercial dispute, a non-signatory party to a contract containing an arbitration agreement may enforce the arbitration agreement. Where the signatory party relies on the other provisions of the agreement in asserting its claims against the non-signatory party in the case, the signatory party is estopped to deny that both parties also agreed to the arbitration provision.

Wachovia Bank v. Schmidt, 445 F.3d 762 (4th Cir. 2006) - An arbitration clause encompassing all disputes "arising out of or relating to" a contract embraces every dispute between the parties having a significant relationship to the contract, regardless of the label attached to a dispute. Thus, a bank that served as an investor's financial advisor was entitled to have arbitration of the investor's state court wrongful inducement claim against the bank. This case also holds that the fact that a signatory receives benefits from a contract is insufficient, in and of itself, to estop it from asserting that a non-signatory is not entitled to invoke the contract's arbitration clause.

Arrowhead Global Solutions v. Datapath, Inc., 166 F.Appx. 39 (4th Cir. 2006) - This case upholds, in the commercial context, the authority of arbitrators to issue a preliminary injunction to prevent misuse of trade secrets. It also holds that an interim arbitration award in the form of a preliminary injunction could be confirmed by the court, notwithstanding the absence of a final award disposing of all claims. This case could have a far-reaching impact in the employment arena because trade secret issues often arise in departing employee cases.

Dockser v. Schwartzberg, 433 F.3d 421 (4th Cir. 2006) - Under the Federal Arbitration Act, any doubts regarding the scope of arbitrable issues should be resolved in favor of arbitration. The question of whether an arbitration agreement provided for the appointment of one arbitrator or three was not a question of arbitrability for the court, but instead was a procedural question which could be resolved, under the American Arbitration Association's (AAA's) rules, by the administrative staff of the AAA because the parties had specifically agreed to abide by AAA rules.

U.S. District Court for the District of Maryland

Erachem Comilog, Inc. v. United Steel, Paper and Forestry, etc., 2007 WL 1219265 (Civil No. CCB-07-168, April 19, 2007) - The trial court (Blake, J.) granted a union's petition to confirm an arbitrator's award finding that the company failed to prove just cause in an employee dismissal, where the employee was discharged for allegedly misrepresenting his physical condition following an on-the-job injury. Although the arbitrator may have misunderstood the holding in a case cited in the award, that part of his opinion was not referred to in his summary of findings reinstating the employee, and therefore was dictum. This case contains a good overview of the law regarding judicial review of arbitration awards in the collective bargaining context.

Genus Credit Management Corp. v. Jones, 2006 WL 905936 (Civil No. JFM-05-3028, April 6, 2006) - Judge Motz refused to vacate an arbitrator's decision that a group of consumers may pursue a class action arbitration against a debt management firm. Judge Motz agreed with the arbitrator that the agreement, which forbade the consumers from participating in a "class action lawsuit" was ambiguous as to class arbitration, and therefore did not preclude such arbitration. This case presents an object lesson as to how sloppy draftsmanship of an arbitration agreement can lead to unintended results.

Julie C. Janofsky is an attorney and arbitrator practicing in Towson. She is a member of Brocato, Price and Janofsky, LLC.

FOURTH CIRCUIT FINDS LIQUIDATED DAMAGES MANDATORY FOR WILLFUL AGE DISCRIMINATION

Loveless v. John's Ford, Inc., 2007 U.S. App. LEXIS 11001 (4th Cir. Va. May 9, 2007)(No. 05-1868, No. 05-2194).

*By: Tammany M. Kramer, Associate
Heller, Huron, Chertkof, Lerner, Simon & Salzman, P.L.L.C.*

In an exciting issue of first impression, the Fourth Circuit held that liquidated damages are mandatory once a jury finds an employer willfully violated the ADEA.

The defendant, John's Ford, is a Virginia corporation that operates several automotive dealerships in Northern Virginia. The plaintiff, Alton Loveless, worked for the company for 28 years, and was a service advisor and service manager at the Annandale location. In November 2000, he was promoted to Parts and Service Director at the Leesburg dealership, and three years later he

was told by his supervisor that he was being "retired." Loveless's termination was effective that same day. Loveless subsequently filed suit in the Eastern District of Virginia, alleging wrongful termination on the basis of age, in violation of the ADEA. After a two-day trial in June 2005, the jury returned a plaintiff's verdict, awarding plaintiff \$250,000 in back pay and finding that John's Ford had willfully violated the ADEA.

The defendant appealed the lower court's denial of its motion for judgment as a matter of law, based on the plaintiff's expert's spoliation of evidence, while the plaintiff appealed the lower court's denial of his request for liquidated damages and for reinstatement of front pay. The Fourth Circuit affirmed the lower court with respect to all issues except that of liquidated damages.

The lower court had declined to award Loveless liquidated damages, concluding that such an award would bestow a windfall on Loveless because the jury had already awarded him \$250,000 in back wages. The Fourth Circuit noted that the windfall notion comes into play in connection with *calculating* a liquidated damages award, not in whether such damages are awarded at all, citing *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 967 (4th Cir. 1985). In *Fariss*, the Fourth Circuit declined to calculate liquidated damages before offsetting back wages claim with lump sum pension, because a liquidated damages award to a plaintiff who suffered no pecuniary loss would bestow a windfall.

The Fair Labor Standards Act (FLSA) provides that an employer who violates the FLSA "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The ADEA's liquidated damages provision is enforced in accordance with the FLSA's § 216, except that "liquidated damages shall be payable only in cases of willful violations of [the ADEA]." See 29 U.S. C. § 626(b). In addition to the language of the statute, the Court of Appeals also relied on *Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111 (1985), in which the Supreme Court noted that, unlike the FLSA which awards liquidated damages to all prevailing plaintiffs, the ADEA entitles prevailing plaintiffs to liquidated damages only in cases of willful violations. The Fourth Circuit found this to be a strong indicator that for prevailing ADEA plaintiffs, such an award is mandatory.

In its discussion of "willfulness," the Fourth Circuit reiterated that a violation is "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." See *Thurston*, 469 U.S. at 128. Observing that the jury instruction in this case was sufficient and accurate, the Fourth Circuit noted that the jury was entitled to find the willfulness standard was met where: (a) the decision maker at

John's Ford knew that Loveless was in the age group protected by the ADEA; and (b) Loveless presented evidence that contradicted the defendant's explanation for his termination at trial.

The *Loveless* decision also addressed the mixed-motive standard and the pretext scheme of proof. The Fourth Circuit rejected John's Ford's claim that Loveless had not proven his case, noting that Loveless had proven his case under *both* proof frameworks. With regard to the mixed-motive scheme, the Court observed that age-related comments are direct evidence of discrimination. When Loveless was terminated, his boss told him he was being "retired." That same decision maker also stated that he was replacing all the department heads, needing "younger, more aggressive" managers whom he could "groom to the way that he does business." He had also referred to other longstanding employees as "dinosaurs." The Fourth Circuit noted that these comments provided "ample evidence that Loveless's age was a motivating factor in [the] decision" to fire him.

In connection with the pretext proof scheme, the Fourth Circuit pointed out that when an employer gives contradictory explanations for its employment decision, as John's Ford did, it can constitute strong evidence of pretext. The Court also rejected the defendant's claim that Loveless failed to make out the necessary prima facie case because Loveless did not satisfy the third prong by showing that "he was at the relevant time performing his duties at a level that met his employer's legitimate expectations." However, Loveless provided evidence that contradicted John's Ford's explanation that he was fired for poor performance, and the Court noted that the jury was entitled to reject John's Ford's assertions and find that Loveless was performing at a level that met his employer's expectations. Thus the defendant was unable to undermine plaintiff's prima facie case simply by asserting Plaintiff's performance was poor.

One other interesting issue the decision addressed is the spoliation of evidence. The Court rejected the employer's appeal on the motion for judgment as a matter of law in connection with spoliation of evidence, concluding the lower court did not abuse its discretion in denying defendant's motion. The plaintiff's damages expert had failed to preserve a handwritten worksheet containing information on which he based back pay calculations. The Fourth Circuit noted that this information had been preserved on the expert's computer and transformed into a chart used at trial, it was based on information available to the defendant, it dealt with damages rather than liability, and the defendant had the opportunity to cross-examine the expert during trial on the issue of the missing document. Therefore, where there was no prejudice to John's Ford's ability to defend the case and no evidence that the conduct was egregious or in bad faith, there had been no abuse of discretion in denying defendant's motion.

The comments by the John's Ford manager certainly showed age-based animus. But, age discrimination is not always and only a result of express animus. Even where an employer believes its reasons are benign or are justified by an ostensible business rationale such as a desire to "groom up" new employees, age discrimination is illegal. Employment lawyers should take note of the Fourth Circuit's decision in *Loveless v. John's Ford, Inc.* Liquidated damages awards can be significant where, as in *Loveless*, the back pay award is sizeable. Notably, liquidated damages are not subject to the unpredictability of non-economic damages awards, which can ultimately fall within a wide range. As *Loveless* shows, not only is compliance with the ADEA the right thing to do, it may well be cheaper in the end.

AN OUTLINE OF BENEFITS AVAILABLE TO WORKERS WHO BECOME DISABLED

By: Elliot Andelman

Our society prides itself on individual responsibility and traditionally shies away from programs that are considered "welfare" or "socialist". Not surprisingly, our social safety net has serious holes in it. For example, the United States is the only industrialized country in the world that does not provide universal health care for its citizens. The focus of this article is to inform the Bar about the programs available, other than workers' compensation, to workers in Maryland if they become disabled to work. Workers' compensation programs provide benefits for workers who suffer an accidental injury that arose out of or in the course of employment. These other programs generally cover disability as a result of a medical condition or conditions, regardless of whether it is caused by illness or accident, and regardless of whether any accident is work related.

This article will outline four (4) basic benefit programs: (1) Social Security Disability Insurance Benefits (DIB); (2) Federal Disability Retirement benefits (FDR) for federal employees; (3) State Disability Retirement for Maryland state employees and public school teachers; and (4) Long Term Disability insurance (LTD) which is most frequently made available through group plans purchased by employers as an employment benefit for employees. In addition to these programs, please be aware that clients who have become disabled may be eligible for state social service programs such as food stamps and medical assistance, as well as protection under the Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA), which are beyond the scope of this article.

I. Social Security Disability Insurance Benefits (DIB)

A. By And For Whom: Run by the Social Security Administration (SSA) of the federal government for citizens and non-citizens who qualify for these insurance benefits by having a sufficient work history. See, 42 U.S.C., Chapter 7; 20 C.F.R., Chapter III, Part 401 et seq.

B. Definition of Disability: unable to engage in substantial, gainful activity by reason of any medically determinable physical or mental impairment for at least 12 consecutive months.

C. Benefits:

DIB maximum monthly benefit for an individual is about \$2,000.00 per month now. It is indexed to inflation and generally goes up a small amount each year. Benefits are only payable until you reach retirement age, which traditionally was age 65, at which time a qualified disabled worker would stop getting DIB benefits and be rolled over into the Federal Old-Age program, which generally pays the same benefits which will last the rest of the retiree's life.

There is also a related program run by the SSA for individuals who meet the same definition of disability, but are not insured. Those individuals who (1) are disabled under the Social Security Act; (2) meet the federal poverty guidelines as set forth by law and regulation; and (3) are a U.S. citizen or have a green card, may apply for Supplemental Security Income (SSI). SSI is a needs based program with a maximum benefit set by statute that is currently approximately \$650 per month. The SSI benefit is reduced by both earned and unearned income received, including your DIB benefit. If you win a claim for both SSI and DIB benefits, the government will first pay you your SSI benefits, and then deduct those benefits from the calculation of your accrued DIB benefits. Once your monthly DIB benefit begins, it will generally eliminate your eligibility for future monthly SSI benefits.

D. Process:

To file an application with the Social Security Administration, you can call 1-800-772-1213 or file online at www.ssa.gov. If your initial application is denied, you have three administrative appeals: (1) request for reconsideration; (2) request for hearing (before an Administrative Law Judge); and (3) request for review by Appeals Council. Finally, there is an appeal to federal court. Review in federal court limited to review of the administrative record for errors of law and findings or fact not

supported by substantial evidence. See i.e. Smith v. Bowen, 826 F.2d 1120 (D.C. Cir. 1987).

E. Substantive Analyses:

The SSA uses a six step process to analyze disability: (1) is claimant presently working; (2) does claimant have a severe impairment; (3) does the impairment meet or equal an impairment listed in Appendix I to Subpart P of Part 404 of the SSA regulations (see sample listing for affective disorders attached hereto); (4) whether the impairment prevents the claimant from doing past relevant work; (5) whether the claimant can perform other work; and (6) whether alcohol or drug abuse is material to any finding of disability.

The key to winning these cases is documentation of symptoms and limitations on activities by treating physicians. The SSA has adopted a "treating physician rule" 20 C.F.R. 404.1527 (d) (2), which provides that the findings of the treating physician are generally to be controlling unless unsupported by objective tests or certain other exceptions

F. Timelines:

On SSD claims, claimant should file within 17 months of last date of work, because SSA will only pay back benefits of one year after the five month waiting period; on an SSI claim benefits will only be paid back to date of application.

On DIB claims, a worker must prove disability began while insured. If an applicant worked five out of the last 10 years and more than 10 years total, that person is normally insured for five years from last date of work. For younger workers, the requirements are pro rated.

The Social Security Administration normally requires that all administrative appeals must be filed within 60 days from the date of the denial decision. See 42 U.S.C. §405(b)(1); 20 C.F.R §§404.909, 404, 933, and 904, 968. The Social Security Administration considers notice of decisions to have been received 5 days after it is dated; therefore, administrative appeals must be filed within 65 days of the date stamped on the notice, unless it can be shown that the notice was actually received later. Claimants can attempt a late filing, but good cause must be shown for the late filing. See 20 C.F.R. §404.911.

The time for filing for judicial review is again 60 days from the date on the notice of the Appeals Council Denial (plus 5 additional days for mailing). See 42 U.S.C.

§405(g); 20 C.F.R. §404.981. Judicial review lies in Federal court. Venue lies in the district in which the claimant resides.

G. Health Insurance:

DIB: The SSA will automatically enroll you in Medicare after you get disability benefits for two years, which is 29 months from the month that SSA finds your disability started.

SSI: In Maryland and the District of Columbia, SSA provides Medicaid eligibility to people eligible for SSI benefits. The SSI application is also the Medicaid application. Medicaid eligibility starts the same month as SSI eligibility.

For more information on representing claimants on claims for DIB and SSI benefits, visit www.nossct.org, or www.ssa.gov.

II. Federal Disability Retirement (FDR)

A. By And For Whom: This program is run by OPM, the Office of Personnel Management for federal workers only. OPM runs two programs, the older Civil Service Retirement System (CSRS) (see 5 U.S.C. 8337 et seq.; 5 C.F.R. 831-1201 et seq.) and the newer Federal Employees Retirement System (FERS) (5 U.S.C. 8451 et seq.; 5 C.F.R. 844.101 et seq.).

B. Definition of Disability:

The definition for both FERS and CSRS is essentially the same:

Employee of federal agency found to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment under procedures prescribed by OPM to a vacant position in the agency at the same grade and pay level in which the employee would be able to render useful and efficient service.

Thus, the definition is generally much narrower than that used by the Social Security Administration, and is fundamentally the inability to perform the employee's own job.

C. Benefits:

There are two major programs:

FERS: Generally, 60% of salary for the first year and 40% of salary thereafter. The employee is required to apply for DIB benefits from the SSA in order to be paid a FERS disability retirement annuity. If DIB benefits are won, the applicant must notify OPM of the award and OPM will then "coordinate" benefits. The coordination

results in an offset of 100% the first year DIB benefits and 60% of the DIB benefits thereafter. Please note that the disabled employee does still benefit financially from winning both FERS disability and DIB benefits from the SSA. Please note also that the FERS disability retirement annuity ends at 62, and at that time the employee's retirement annuity is calculated and paid from that age onward.

Under the FERS retirement system it is important to recognize that employees may retire at age 60 with at least 20 years of service with reduced benefits and age 55 with a minimum of 10 years of service with greatly reduced benefits. Early retirement will cause benefits to be reduced by 5% for each year you are under age 62 when you retire. There is also a gradual extension of the minimum age of 55 for retirement under FERS for employees born in 1948 and thereafter.

CSRS: There is a minimum guaranteed disability retirement annuity for employees covered under CSRS which is based on the lesser of 40% of their high-three average salary or an amount computed under a general formula based on years of actual service plus remaining years to age 60. Under this program you are not required to apply for DIB and there is no offset. Like FERS, the CSRS disability annuity ends at age 62, and the employee's retirement annuity is calculated and paid from that age onward.

In addition, federal employees covered under CSRS may be eligible for regular retirement benefits even before age 62 if they are age 55 with at least 30 years of service or age 60 with at least 20 years of service.

D. Other Qualifications.

For the FERS program, an employee must have 18 months of creditable service to be eligible to apply for the FERS disability retirement annuity. For the CSRS program an employee must have 5 years of creditable service to apply for the CSRS disability retirement annuity.

E. Process:

If an initial application is denied, the appeal process includes an administrative appeal for reconsideration, an appeal to MSPB where you get a de novo hearing before an Administrative Judge (AJ) within 120 days. If the AJ denies the claim, the claimant may petition for review by the Board of the MSPB. Pursuant to 5 C.F.R. 1201.115, review is for errors of law or the discovery of new and material evidence that, despite due diligence, was un-

available when the record was closed. Finally, an aggrieved employee can appeal to the U.S. Court of Appeals for the Federal Circuit. However, review by the Court is restricted to claims of substantial violation of important procedural rights, misconstruction of the governing legislation, or some like error going to the heart of the administrative determination.

F. Limitations period:

An employee must file an application for disability retirement within one year of date of separation from the federal government. In addition, all appeals must be timely filed. The appeals are generally due within 30 days of the date of decision.

G. Health Insurance:

An employee who is awarded a disability retirement can continue to carry the same group health insurance that they carried on their last day of employment with the government if they were covered for the five years of government service directly before going onto disability retirement or they were covered for less than five years but obtained coverage at the first opportunity they could do so after entering government service.

For more information on representing claimants on claims for FDR Benefits, visit www.opm.gov.

III. Long Term Disability (LTD)

A. By And For Whom: LTD is specifically a type of insurance and is sold by insurance companies. A person can purchase an individual policy. However, like health insurance, most people obtain coverage through group policies, which are then called plans, which are sold by the insurance companies to employers for the benefit of employees. So most often LTD insurance is a benefit of employment, in which case it is controlled by Federal law - ERISA (Employee Retirement Income Security Act, 29 U.S.C.A. §1001, et seq) and regulations promulgated by the U.S. Department of Labor. 29 C.F.R. 2560.503-1 et seq.

B. Definition of disability:

Each insurance policy has its own definition. Commonly, for the first two years, disability is defined as the inability to perform your own occupation – that is, the job in which you were working at the time you became disabled.

After two years, disability is commonly redefined as the

inability to perform any occupation, or at least any occupation for which you are qualified by reason of education, training or experience.

In addition, there is frequently a two-year cap on benefits for mental or emotional impairments, and in some policies there is a two year cap for other types of impairments. In some policies now there is a two year cap on any “neuromusculoskeletal or soft tissue” impairment. These policies are truly misnamed and should more aptly be called, “Two Year Disability Insurance” policies.

C. Benefits:

Again each policy or plan sets its own benefits level. Most commonly, benefits are set at 60% or 66% of salary. Other plans are set at 50% or 70% of salary. Salary can be defined as base salary only, or may be defined as to include bonuses, overtime, etc. Almost all ERISA LTD plans, however, offset “other income” including any other disability benefits or retirement benefits that the claimant receives. Thus, the actual LTD benefits paid can be much lower than the nominal amount provided for in the policy.

D. Process:

File initial application within time limit established in the plan/policy, which is basically a contract of insurance. Frequently, the contracts establish very short time limits, such as 90 days. The application normally requires a statement from the applicant, from the employer, and from the treating physicians. If the initial application is denied, then the employee has the right to an administrative appeal. Under ERISA, plans are required to provide for at least one administrative appeal, and employees are required to exhaust that administrative appeal process. ERISA regulations provide that an employee has 180 days to file an administrative appeal, and that the insurance company is expected to decide the appeal within 45 days, with the right to an automatic extension of an additional 45 days. However, there are exceptions to this time limit and no effective remedy if the decision is late.

ERISA does provide that employees are entitled to a complete copy of the insurance policy and of the complete file including medical records to use on appeal. 29 C.F.R. §2560.502-1(g) et seq. ERISA’s mandatory administrative appeal, however, does not include a hearing and does not include use of an administrative law judge (ALJ) such as are made available by Social Security, and the appeal processes for both federal and state employees.

Appeal to court under ERISA are available. However, generally, you must file in federal court, and are subject to removal if you file in state court. There is no right to a jury trial and minimal discovery. A federal court appeal is basically a review of the administrative decision and record. The standard of review in court places a high burden on employees. Generally, the employee must prove that the decision is arbitrary and capricious or not supported by substantial evidence. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989); Bynum v. Cigna Healthcare of North Carolina, Inc., 287 F.3d 305 (C.A.4 2002). The Fourth Circuit has adopted a standard of review that has a sliding scale from de novo review to abuse of discretion, depending primarily upon whether the insurance contract grants discretion to decide facts and interpret the policy to the carrier/plan administrator (which most policies do), and whether the plan administrator is operating under a conflict of interest. see Bedrick v. Travelers Ins. Co., 93 F.3d 149 (C.A.4 1996); Booth v. Wal-Mart Stores, Inc. Assoc. Health and Welfare Plan, 201 F.3d 355 (C.A.4 2000). The Supreme Court has held 9-0 that there is no “treating physician rule.” See Black & Decker Disability Plan v. Kenneth Nord, 123 S.Ct. 1965 (2003). Of course, a “treating physician rule” could be created by regulations issued by the Department of Labor.

For policies that are not covered by ERISA (such as individual policies or policies for government employees), an employee can appeal to state court. There is a right to a jury trial in state court under traditional breach of contract cause of action. The employee must simply prove his or her case by a preponderance of the evidence. There is full discovery. (Patients Bill of Rights may address burden of proof and make it more fair to employees.)

E. Timelines:

Administrative appeal procedures and time limits are set forth in each individual policy/contract of insurance. ERISA regulations require that following initial determination there is an opportunity for an administrative appeal, which must be filed within 180 days.

Because ERISA does not contain a specific statute of limitations, the applicable limitations period for filing in court has been the subject of litigation. See Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 189 F.3d 1160 (CA9, 1999) (Federal law determines when an ERISA cause of action accrues, despite the fact that state law determines the relevant statute of limitations); Brunolli v. Fred Brunolli & Sons, Inc. Pension Plan, 993 F.Supp. 66 (D.Conn, 1997) (Because ERISA is

silent as to the applicable limitations period, the court applied the statute of limitations most analogous to the federal claim); Cotter v. Eastern Conference of Teamsters Retirement Plan, 898 F.2d 424 (CA4, 1990) (The parties agree that Maryland’s 3 year statute of limitations for contract actions governs the ERISA benefits claim).

Be aware that LTD contracts often provide their own limitations period that may be enforced. See Northlake Regional Medical Center v. Wafflehouse Sys. Employee Benefit Plan 160 F.3d 1301 (CA11, 1998) (Federal courts hearing ERISA suits to recover benefits generally borrow the most closely analogous state statute of limitations period, unless the parties have contractually agreed upon a limitations period) (emphasis is added). In fact, many of the LTD policies contain a limitations period. An example of contract language on limitations is set forth below,

LEGAL ACTIONS. You may not start a legal action to recover on this policy within 60 days after you give us required proof of loss. You may not start such action after 3 years from the time proof of loss is required.

In a brand new Fourth Circuit decision, the Court held that the contract can set forth the statute of limitations period, but that ERISA requires that the period not begin running until after administrative review has been exhausted. See White v Sun Life Assurance Company of Canada, No. 06-1285, (CA4, April 26, 2007).

The statute of limitations on non-ERISA policies will be governed by state law. Typically, the statute of limitations applicable to these benefit claims will be the statute of limitation in each state applicable to contract actions. See Cotter, Supra.

F. Health Insurance:

LTD coverage does not provide health insurance coverage. However, a few employers allow employees to continue in the employer health insurance program while the employee is receiving LTD benefits.

For more information on representing claimants on claims for LTD benefits, see Employee Retirement Income Security Act of 1974 (ERISA) at http://www.dol.gov/ebsa/compliance_assistance.html.

IV. STATE DISABILITY RETIREMENT BENEFITS

A. By And For Whom: Run by the State of Maryland for state employees and public school teachers and administrators. See 29 Md.Code Ann. 101 et seq; 22 COMAR Subtitle 06.

B. Definition of Disability:

A covered employee must demonstrate a permanent medical inability to perform the duties of his or her job, as determined by the Medical Board of the State of Maryland Retirement Agency. Permanent is defined as a disability that is expected to last at least one year.

C. Benefits:

If an employee is awarded benefits they receive a monthly annuity. The amount is dependent on several factors including (1) whether you were in a contributing or non-contributing pension system; (2) whether the disability is ordinary or accidental; and (3) the highest three consecutive years of salary, which may not necessarily be your three most recent years of salary.

Accidental disability benefits are substantially higher. An accidental disability retirement must result from an accident that arose out of and in the course of your employment.

These benefits will not be reduced by DIB benefits and no application for DIB benefits is required.

D. Eligibility:

To be eligible to apply for ordinary disability retirement, you must have a minimum of five years of eligible service at work. There is no minimum service requirement for an accidental disability retirement.

E. Process:

An initial application for disability retirement may be filed while you are still working. A claim must normally be filed within three years of going off payroll. The initial application includes sections completed by the applicant, the employer and the applicant's treating physicians. If an employee's initial application is denied, there is the right to file for reconsideration. If the claim is denied again, there are further appeal rights, which include a hearing before an administrative law judge, and ultimately an appeal on the record for limited Circuit court review.

F. Health Insurance:

A State employee who is approved for a disability retirement (accidental or ordinary) is automatically eligible for continued health insurance coverage through the State Health Program. The State subsidizes health premium costs for retired State employees. The amount of this subsidy is determined according to each retiree's State creditable service.

If you are a County employee, such as a public school teacher, your eligibility for continued health insurance coverage is determined by the County for which you worked. Each county has different requirements. Prince George's County, for instance, requires 12 years of service to be eligible for continued health insurance coverage on an ordinary disability retirement claim.

For more information on representing claimants on claims for State Disability Retirement Benefits, see the www.sra.state.md.us.

For further information on representing clients in any of the areas dealt with above, you may visit the website at www.andalmanflynn.com.



MARYLAND LAW BANNING EMPLOYMENT DISCRIMINATION EXTENDED STATEWIDE

On October 1 most employees in Maryland (those employed in enterprises employing at least 15 employees) will have the right to sue for discrimination in state circuit courts. By votes of 136-3 and 39-8 the House of Delegates and Senate brought Maryland into line with 40 other states which have enacted anti-discrimination laws. Until now employees in only Howard, Montgomery and Prince George's County (Art. 49B §42) and to a limited extent Baltimore County (Art. 49B §43), could bring state court actions. Laws in those jurisdictions are unaffected by the new legislation, which was signed by Governor Martin O'Malley on April 24th. Delegate Sandy Rosenberg (D-Balt. Co.) and Senator Jamie Raskin (D-Mont.) were the bills chief sponsors.



There are important differences between the Maryland, federal and several county laws. The table below highlights the major differences.

	Federal Law¹	Article 49B	Baltimore County	Howard County	Montgomery County	Prince George's County
COVERAGE	15 or more employees	15 or more employees	<u>Less than</u> 15 employees	5 or more	1 or more	1 or more
PROTECTED CLASSES	Race, Color, Religion, Sex, National Origin, Age, Disability, Retaliation	Adds Marital Status, Sexual Orientation, and Genetic status	Same as 49B	Same as 49B and adds Familial Status, Political Opinion, and Occupation	Same as 49B and adds Family Responsibilities	Same as 49B and adds Familial Status, Political Opinion, and Occupation
STATUTE OF LIMITATIONS (1) Administrative (2) Judicial	(1) 300 days (2) within 90 days of administrative leave	(1) 180 days (2) Not specified	(1) 6 months (2) 2 years	(1) 6 months (2) 2 years	(1) 1 year (2) 2 years	(1) 180 days (2) 2 years
EXHAUSTION OF ADMINISTRATIVE REQUIREMENTS²	180 days	180 days	60 days	45 days	45 days	45 days
ATTORNEYS FEES & COSTS	Available to prevailing party including deposition costs	Same excludes deposition costs	Same as 49B	Same as 49B	Same as 49B	Same as 49B

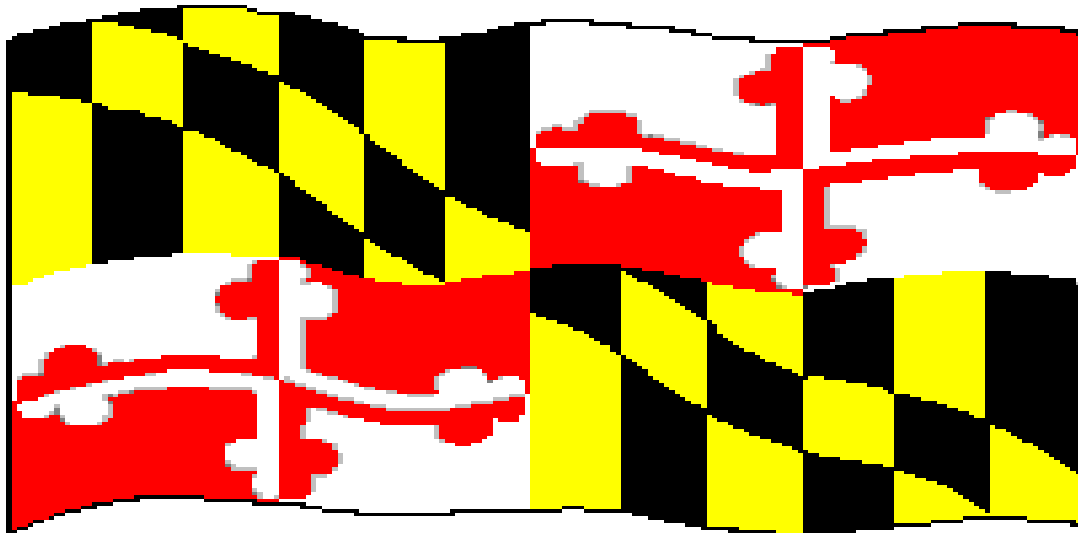
(continued on page 14)

	Federal Law ¹	Article 49B	Baltimore County	Howard County	Montgomery County	Prince George's County
DAMAGES	(1) Back pay and other make whole remedies; (2) injunctive relief; (3) Compensatory damages not to exceed \$50,000 to \$300,000 depending on number of employees; (4) punitive damages in some cases	Same as federal law	Punitive damages not available	No specified limitations on "damages, injunctive relief, or other civil relief"	No specified limitations on "damages, injunctive relief, or other civil relief"	No specified limitations on "damages, injunctive relief, or other civil relief"

Footnotes

¹ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. Summary concerning protected characteristics includes those protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.; Americans with Disabilities Act of 1990, 42 U.S.C. §12101, et seq. All other summaries of federal law refer exclusively to Title VII.

² Runs from date of discriminatory act unless otherwise noted.



JURY AWARD CASE INVOLVES CONTE ISSUE

By: Deborah Thompson Eisenberg
Brown, Goldstein, & Levy, LLP

On April 23, 2007, following a six-day trial, a jury in the Circuit Court for Baltimore City awarded Plaintiffs severance pay, plus enhanced damages, for a total award of \$338,000 under the Maryland Wage Payment & Collection Act (a fee petition is pending).

Plaintiffs were executives at a sports equipment company in Baltimore City. The Company, founded in 1994, became an overnight success and the ninth-fastest growing company in the nation. In 2005, the Company searched for a new owner and offered Retention Agreements to its key talent. The Agreements promised that if the plaintiffs stayed employed during the “change in control,” and were later terminated without “good cause,” the Company would pay them a severance of six-months salary.

After new owners took over, many managers at the Company, including the plaintiffs, believed they had a fiduciary duty to advise the Board of what they perceived to be a leadership vacuum and potentially high attrition rates. Managers signed a letter explaining their concerns and asked that the new owner proceed as it saw fit.

After the concerned managers pursued these issues, they were terminated and their severance was withheld despite the Retention Agreements. The Agreements provided that for the purpose of determining the entitlement to severance, “Good Cause” for termination meant, in part: the commission by the Executive of any act intended to materially damage the business, or the commission by the Executive of any act that constituted a conflict of interest with the Executive’s employment by the company.

Plaintiffs filed suit to recover their severance, arguing their actions in advising the Board of perceived problems at the company were undertaken in the best interests of the Company.

Plaintiffs prevailed before the jury and were awarded their severance, plus enhanced damages and the right to seek their counsel fees and costs. The Company has filed a post-trial motion for judgment notwithstanding the verdict, and expressed an intention to appeal.

One significant legal issue in the case is whether *Towson Univ. v. Conte*, 384 Md. 68 (2004), which in part holds that the personnel decisions of employers cannot be “second-guessed” by or in courts, applies to wage actions where the contract specifically defines “good cause.” *Conte*, and all of the out-of-state cases on which it relied, involved wrongful termination claims, where the definition of “good cause” was non-existent, broad or ambiguous. In contrast, the case we are discussing here is a wage case, with a contract that specifically and narrowly defines “good cause.”

In other states that have appellate decisions similar to *Conte*, courts have distinguished contracts that have specific language that must be applied. For example, in *Vetter v. Cam Wal Electric Cooperative, Inc.*, 711 N.W.2d 612 (S.D. 2006), the court rejected the employer’s reliance on *Conte*-type cases because the contract narrowly defined “good cause.” Likewise, in *Janoff v. Gentle Dental, P.C.*, 986 P.2d 1278 (Or. App. 1999), the court held that *Conte*-type cases did not apply because the contract narrowly defined the permissible grounds for termination, stating: “There is no reason to treat [plaintiff’s employment contract] differently from every other contract, including plaintiff’s right to a judicial determination of all factual issues related to whether he had consistently failed to do what the contract required or whether, in contrast, defendant breached its provisions when it terminated his employment.” *Id.* at 1280.

Nevertheless, the circuit court in this case gave a *Conte* instruction, telling the jury it could not “second guess the personnel decisions” of the Company. Rather, it could only assess whether the Company acted as a reasonable employer, basing its decision on a reasoned conclusion supported by the evidence. The *Conte* issue will likely be reviewed at the appellate level if the case is appealed further, and the effect of a clear good cause definition in a *Conte* type case may well be clarified in Maryland.



LABOR AND EMPLOYMENT SECTION
Maryland State Bar Association, Inc.
520 West Fayette Street
Baltimore, Maryland 21201