

MARYLAND STATE BAR ASSOCIATION
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Albert W. Palewicz, *Editor*
Jonathan R. Topazian, *Co-Editor*

Section Officers:

J. Michael McGuire, *Chair*
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FROM THE CHAIR

By J. Michael McGuire

As I write this short “Chair” column just after the holidays, I would like to express a thought that has occurred to me several times over the past few years. Labor and employment law practitioners represent competing interests in some of the most passionate disputes one can imagine. Strikes and picket lines have the potential to bring out the worst in people — both management and labor. Employment separations and resulting litigation can be very emotional — after all, they deal with the loss of a job, which is a fundamental need we all have. Yet, given these passions, I am constantly surprised and comforted by the civility demonstrated — for the most part — by members of the Maryland labor and employment bar to each other. Perhaps this civility comes from the relatively small size of the “active” labor bar in Maryland (I say “active” because while there are nearly 700 members of the MSBA’s Section of Labor and Employment Law, it seems that a much smaller number regularly appear before the NLRB or represent clients in Title VII federal court litigation. Perhaps this “familiarity” causes Maryland employment attorneys to curb their baser instincts.

I am reminded of a report of a Supreme Court oral argument in 1993 in which counsel for the Petitioner referred to opposing counsel as “my adversary.” Justice Antonin Scalia interrupted the lawyer to say that while the attorneys’ clients were perhaps adversaries, the other lawyer should be considered “not your adversary ... He’s your friend.” Justice Scalia’s comment sets a standard for civility that I feel we have reached here in Maryland labor and employment law circles, and for that we should all be thankful.

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EDITOR'S CORNER

By Albert Palewicz

Welcome back to reality. The holidays are over. The food has all been eaten. (Now, go work it off!) It is really winter, and it will be cold for the next ten weeks—no matter what that little beast in Pennsylvania sees on February 2.

Is all that optimistic enough for you? Well, at least the DOW has been up so far. And we have a great new issue of the Section Newsletter for you. This issue is a little different from many of the issues we do. It is written by a group of sponsors, and not by one firm or organization. The joint sponsors of the issue are the Baltimore firm of Brown, Goldstein & Levy, LLP, and the Maryland Employment Lawyers Association (MELA), represented by six different attorneys, from five different firms and the Public Justice Center. MELA is the Maryland affiliate of the National Employment Lawyers Association that represents employees in employment matters. If anyone wishes information on joining MELA, you may contact the coordinator of this issue, Deborah Eisenberg at Brown, Goldstein & Levy (dte@browngold.com).

The next issue of the newsletter will be sponsored by the firm of Farber, Rubin, LLC. Steven Kaplan of the firm will be the coordinator of the issue. Like this issue, the Spring 2006 issue will be produced by a first-time sponsor of the newsletter. Since we have been “in business” now for more than 10 years, it is always good to get a new sponsor. To have two of them in a row is very unusual. I want to take the opportunity to remind all who are reading this that we are always looking for new sponsors. Whether it is a law firm or other entity that wishes to sponsor an entire issue, or whether it is a group effort, like the one you hold in your hands, it is good for the section and for the law that there continues to be

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FROM THE CHAIR (continued)

A brief thanks to NLRB Regional Director Wayne Gold for appearing as our featured speaker at our 2005 Fall Dinner Meeting on this topic. "What Every Employment Lawyer Should Know About Labor Law." Wayne gave an excellent NLRB update on many wide-ranging topics of interest. Thanks to Gab Terrasa for assisting me in organizing the Program.



EDITOR'S CORNER (continued)

new interest in sharing knowledge of our practice arena with one another. Please consider taking part in the sponsoring of an issue.

Finally, I would like to tell you that MICPEL and the Section of Labor and Employment Law are planning a spring or early summer program on the basics of employment law. Watch for it. It will be useful to many of us. Also, we should be announcing the details of the Spring Dinner Meeting in the next issue of the Newsletter.



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.



ARTICLES

YOU CAN RUN BUT YOU CAN'T HIDE:

SOX Whistleblower Protections Apply to Employees of Non-Public Subsidiaries of Publicly Traded Companies

*By: Deborah Thompson Eisenberg
Brown, Goldstein & Levy, LLP
dte@browngold.com*

The Sarbanes-Oxley Act (“SOX”) contains a whistleblower provision that protects employees who report fraudulent activities of publicly traded companies from retaliatory adverse action. 18 U.S.C. ‘ 1514A. Since the Act was passed in 2002, the emerging case law from the Department of Labor (“DOL”) holds that non-publicly traded subsidiaries of publicly traded companies are liable under the Act as well.

Unlike other anti-discrimination laws, SOX does not define coverage simply in terms of the employers covered by the Act, but of the employees who are protected. Section 806 casts a wide net to protect three categories of workers. Its anti-retaliation prohibitions apply to: (1) any company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or (2) any company that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or (3) any officer, employee, contractor, subcontractor, or agent of such company. 18 U.S.C. ‘ 1514A(a). The regulations promulgated by the DOL prohibit any company or company representative from retaliating against an employee who engages in protected activity under the Act. 29 C.F.R. ‘ 1980.102(a).

The implementing regulations define employee expansively to mean an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative. 29 C.F.R. ‘ 1980.101 (Emphasis added). A company representative is defined broadly to encompass any officer, employee, contractor, subcontractor, or agent of a company.

Given these broad definitions, SOX does not require that a respondent be an employer to be liable for a violation. *Kalkunte v. DVI Financial Services, Inc., et al.*, 2004-SOX-56 (July

18, 2005), at 9 (holding non-publicly traded contractor was proper respondent as company representative and agent under SOX). See also *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-27 (ALJ Apr. 30, 2004) (finding holding company that did not directly employ complainant liable under the Act).

In *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004), an administrative law judge ruled that the term employee of publicly traded company under Sarbanes-Oxley includes all employees of every constituent part of the publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to its internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports. *Id.* at 4. (Emphasis added). In *Morefield*, the ALJ denied the respondents motion to dismiss a complaint filed by an employee who worked for a non-publicly traded subsidiary of a subsidiary of a publicly traded company. The ALJ explained that the broad remedial purposes of SOX protect employees of subsidiaries of publicly-traded companies:

The publicly traded entity is not a free-floating apex. When its value and performance is based, in part, on the value and performance of component entities within its organization, the statute ensures that those entities are subject to the internal controls applicable throughout the corporate structure, that they are subject to the oversight responsibility of the audit committee, and that the officers who sign the financials are aware of material information relating to the subsidiaries. A publicly-traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. *Id.* at 3 (Emphasis added.)

Given the Acts' purpose and structure, the ALJ concluded: In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization. *Id.* at 3.

Since *Morefield* was decided, most ALJs faced with the question have recognized and agreed with its analysis. For example, in *Stojicevic v. Arizona-American Water Co.*, 2004-SOX-00073

(ALJ Mar. 24, 2005), the complainant named only its employer, a subsidiary of a publicly traded entity as a respondent. Citing *Morefield*, the ALJ found that this subsidiary of a publicly traded company was a covered company and proper party under SOX. *Id.* at 1.

In *Gonzalez v. The Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004), the complainant named only a subsidiary of a publicly traded company in his initial complaint. Very late in the case, after discovery had been conducted and the respondent had filed a motion for summary decision, the complainant moved to amend his complaint to add the parent company as a respondent. The ALJ permitted this amendment, and denied the motion for summary decision. The ALJ determined that Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies. *Id.* at 3.

See also *Platone v. Atlantic Coast Airlines Holding, Inc.*, 2003-SOX-27 (ALJ Apr. 30, 2004) (holding that privately-held subsidiary was subject to the Act where the publicly-traded parent corporation used the names of subsidiary and parent interchangeably); *Klopfenstein v. PCC Flow Technologies Holdings, Inc., et al*, 2004-SOX-11 (ALJ July 6, 2004), at 8 (agreeing that employees of non-public subsidiaries of publicly traded companies can be covered by the whistleblower protection provisions of the Act, but not finding coverage under facts of that case).

Employers of non-publicly traded subsidiaries will of course urge the DOL and courts to take a more myopic view of SOX coverage. In turn, complainants can argue that a subsidiary's attempt to hide behind its corporate charter to evade SOX liability flies in the face of the basic tenets of the law. SOX requires that publicly traded companies take extensive compliance measures at all levels, including their subsidiaries, to ensure financial integrity and to encourage employees to blow the whistle on fraud. It makes no sense that Congress would require that publicly traded companies implement such measures at subsidiary level, yet not extend the employee protection provision to employees of those subsidiaries who suffer retaliation after blowing the whistle. As *Morefield* noted: it does not serve the purposes and policies of the act to take too pinched a view of this remedial statute when it comes to protecting those in an organization who can address concerns Congress sought to correct. *Morefield*, *supra*, at 2.

"Oh Mon Dieu! My Client Filed for Bankruptcy and Didn't Tell Me!"

*By: Beth Pepper
Law Office of Beth Pepper*

Introduction

Imagine the following scenario: You are a plaintiff's employment lawyer. After careful investigation of your case, you file a timely Title VII complaint in federal court. You are confident, prior to filing, that your case will overcome summary judgment, and your client will have the gratifying opportunity to plead his case to the jury. The defendant files an answer. The Court issues a scheduling order and away we go! You pick up the phone to confer with the employer's lawyer about discovery, and learn, for the first time, from your adversary, that your client filed for bankruptcy during the course of the EEOC administrative process and did not list the EEOC claim in his or her bankruptcy petition. Your adversary plans to file for summary judgment. You are totally caught off guard. Bankruptcy? What does this have to do with the discrimination laws? The short answer is that it can have a serious impact upon your client's right to pursue his or her case, and, is another procedural maze that plaintiffs' lawyers have to navigate, and investigate before filing an employment discrimination case in court.

Two doctrines come into play. One is the "real party in interest" under Rule 17(a). The other is the doctrine of judicial estoppel. This article takes a look at both doctrines in the context of a Title VII suit, where there is an omission of the Title VII claim in a prior bankruptcy proceeding, and the facts giving rise to the claim occurred prior to the filing of the bankruptcy petition by the employee. This article also briefly explores ways to remedy such omission. Because of the complexity of the topic, and the limited space allocated to it, this article is meant as an introduction to the issue. This article also owes a great debt to Marc Kivitz, a bankruptcy lawyer in Baltimore City, who helped this author understand some of the important principles at stake. (Rule #1-Don't go it alone!)

1. Real Party in Interest- Rule 17 (a)

Rule 17(a) of the Federal Rules of Civil Procedure states that "every action shall be prosecuted in the name of the real party in interest." Real parties in interest are "the persons or entities possessing the right or interest to be enforced through the litigation." Moore's §17.01[1]. A party not possessing a sub-

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stantive legal right is not the real party in interest with respect to that right. *Id.* Because most employment discrimination cases seek monetary relief, the real party in interest to bring such claims is the trustee in bankruptcy, assuming the facts giving rise to the discrimination claim arose prior to the filing of the bankruptcy petition by the employee. 11 U.S.C. § 541(a). Thus, if there is an EEOC claim pending at the time the bankruptcy petition is filed, it must be disclosed to the estate, and it is the Trustee, not the debtor, who has the authority to pursue it for the benefit of creditors.¹

What if, however, the debtor has brought his or her discrimination case without the trustee, unaware that the discrimination claim for monetary relief belongs to the estate? What if, too, the debtor had omitted the pending EEOC complaint from the bankruptcy schedule because he or she honestly did not know that such disclosure was necessary, and the debtor's bankruptcy lawyer did not know either?

According to the treatise writers and case authorities, the remedy is to permit the trustee to ratify the action (or, in the alternative, to be joined or substituted) under Rule 17(a), coupled with reopening the bankruptcy case (if it has been closed) or amending it (if it is still open at the time) to amend the erroneous schedule and add the discrimination claim to the schedule. Such remedy alleviates any problems that may have existed by filing a federal discrimination case initially without the trustee as a party plaintiff.

This approach favors the interests of creditors who have an opportunity to capture some of the recovery, and respects the liberal rules of the bankruptcy court that allow schedules to be freely amended for the benefit of creditors. See generally, Brown et. al., "Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums," 75 American Bankruptcy Law Journal 197, 227 (2001). Moreover, by ratifying the action, the trustee agrees to be bound by its result, thereby protecting the defendant/employer against a subsequent action by the party actually entitled to relief, and ensuring that the judgment will have a proper *res judicata* effect. *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973).

Thus, all is not lost when confronted with a situation in which the Title VII case has been filed and there had been an honest omission of the claim in a prior bankruptcy case. Contact the trustee and the bankruptcy lawyer; move swiftly to open the bankruptcy case and amend the schedules, and enter into a

ratification agreement with the Trustee whereby he ratifies the continuation of the action and agrees to be bound by it.²

2. Judicial Estoppel

Judicial estoppel is strong medicine, and the courts guard against its use as a technical sword, especially if its effect is to preclude viable claims on the basis of inadvertent and good faith inconsistencies. Thus, it may only operate to bar an employment case if there is evidence that the omission of the discrimination claim in the prior bankruptcy proceeding was made with "intent to defraud."

Noting that the doctrine is a narrow one, the Fourth Circuit, in *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996), set forth the three elements that must be met in order for a federal district court in this Circuit to impose the doctrine to bar an action: (1) the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation; (2) the prior inconsistent position must have been accepted by the court; and, (3) the party sought to be estopped must have "intentionally misled the court to gain unfair advantage." *Id.* The "determinative factor" is the third element-intentionally misleading the court to gain unfair advantage. All three elements must exist for the doctrine to apply. *Id.*

While an omission of the EEOC claim from the bankruptcy schedule would constitute a prior inconsistent statement, courts have found that "intent to defraud" cannot be inferred from an omission alone. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 364 (3^d Cir. 1996). Instead, an analysis of the decisions around the country shows that courts consider the entire factual and evidentiary record to make such a determination. Courts consider, for example, evidence regarding the sequence of events, corrective action, specific language in the schedules, affidavits in response to defense motions to dismiss, the frequency of the omissions, missed opportunities to amend the schedules, the role of counsel, plaintiff's legal background, and plaintiff's knowledge of the actual value of the claim.

A synthesis of the cases shows that an omission is inadvertent if a plaintiff admits the mistake based on a lack of understanding or information, invites the trustee to participate in the Title VII action, takes steps to amend the bankruptcy schedule, and even goes as far as to have the bankruptcy court appoint the employee's attorney to pursue the discrimination case for the benefit of the estate and its creditors.

For example, in *Taylor v. Comcast*, 252 F. Supp. 2d 793, 797-99 (E. D. Ark. 2003), plaintiff's omission was inadvertent because plaintiff had little knowledge of the legal system and relied on the expertise of his employment lawyer during the EEOC investigation and his bankruptcy attorney during the bankruptcy proceedings. Likewise, in *Pealo v. AAF McQuay*, 140 F.Supp.2d 233, 237-38 (N. D. N.Y. 2001), plaintiff's omission was inadvertent because the plaintiff relied upon his attorney to make the required disclosures, reopened the bankruptcy estate, and the Bankruptcy Court specifically appointed plaintiff's counsel to represent the interests of the bankruptcy estate in the employment case. So too the omission was deemed inadvertent in *Cannon-Stokes v. Potter*, 2004 U.S. Dist. LEXIS 3272, at *15-16 (D. Ill. 2004), where the plaintiff had no legal training, had been told that she did not have to list her EEOC charge which was under investigation, relied on her attorney's expertise in preparing the bankruptcy petition, and had taken steps to reopen the bankruptcy case.

In contrast, if the plaintiff fails to invite the trustee to participate in the discrimination case, or fails to take corrective steps such as amending the bankruptcy schedule, or refuses to admit that disclosure is warranted, or expressly values the EEOC claim at the time of the bankruptcy case, or misses opportunities to amend the schedule, or express deceptive conduct, courts are more likely to view such conduct as evidence of an "intent to defraud."

For example, in *Graham v. United Parcel Service, Inc.*, civil action no. RWT-03-02043, *33 (D. Md. 2004) (Titus, J.)(unreported), the court found intent to defraud because the plaintiff believed that the estate had no claim to recovery in his discrimination case, made no attempt to contact the trustee, and omitted his Title VII lawsuit from the bankruptcy case "not once, but twice" when converting his bankruptcy proceeding from Chapter 13 to Chapter 7. Similarly, in *Isinternetworking, Inc. v. General Growth Management, Inc.* 310 B.R. 274, 285-86 (Bankr. D. Md. 2004), intent was found in part because there was evidence that the plaintiff answered a counterclaim question with a written answer listing a refund claim, but omitted a claim against the defendant, and also knew the value of the claim.

Conclusion

In conclusion, the Trustee is the real party in interest with respect to pursuing damages in a discrimination case where the claim arose prior to the filing of the bankruptcy petition.

The employee who believes in the merits of his or her case should seek to have the Trustee participate in bringing and/or maintaining the discrimination case. Further, if the employee can demonstrate that the omission of the EEOC claim from the bankruptcy schedule was an honest mistake, evidenced by corrective steps to amend those schedules, he or she stands a better chance of avoiding the harsh result of judicial estoppel.

Footnotes

¹ *While claims for monetary relief belong to the estate, there is some authority to support the proposition that claims for injunctive relief (such as reinstatement, or changing policies of the employer) belong to the debtor, because these add no value to the estate and are of no consequence to creditors. See Burnes v. Aeroplex*, 291 F.3d 1282, 1289 (11th Cir. 2002).

² *Occasionally courts blur the distinction between 'real party in interest' and standing in the context of addressing this problem. But "standing" appears to be the wrong analysis. The question of who has the right to bring an employment discrimination case is one of real party in interest. In contrast, standing is the question of whether the party before the Court meets certain Article III criteria for bringing suit. 6A Wright, Miller, and Kane, Federal Practice and Procedure Civil 2d §1542; see also, Barger v. City of Cartersville*, 348 F. 3d 1289, 1292 (11th Cir 2003). *This distinction is important because it affects the type of remedy. Viewed as a "real party in interest" problem leads to Rule 17 remedies, and keeps the case alive. Viewed as a constitutional problem leads to dismissal.*

How to Get Sued in Business (Without really Trying):

Pitfalls of the Fair Labor Standards Act

*By: Philip B. Zipin, Esquire
Zipin & Melehy, LLC*

In life, four things, not three, are certain: life, death, taxes, and the fact that each day there are literally thousands of Maryland employers who are not paying overtime wages – whether through ignorance, negligence or malicious intent — earned by employees.

In the last few years, there has been an explosion of class action and individual lawsuits under the Federal Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (“FLSA”), and state analogues. Major corporations which have paid millions of dollars for overtime violations have included CNA, State Farm, Blockbuster, GEICO, AutoZone, Farmers Insurance, Pacific Bell, Taco Bell, and Starbucks. A recent Google search under the heading “Billions in Overtime Claims” yielded nearly 500,000 hits! In November 2005, the United States Supreme Court weighed in and ruled “donning” and “doffing” of safety equipment to be compensable time under the FLSA. This spate of high profile lawsuits and recent Supreme Court activity has many employers – large, small and in between – asking what they can do to avoid being sued for overtime violations.

Overview of the FLSA

The FLSA was enacted in 1938 to encourage full employment and safe working conditions. The FLSA regulates minimum wage, child labor and overtime for employers who engage in interstate commerce and whose annual sales are in excess of \$500,000 — virtually every business of consequence. The FLSA categorizes employees as either exempt or non-exempt for purposes of overtime eligibility. Non-exempt employees must be paid at the rate of one and one-half times their “regular” rate for all hours over 40 in a given workweek.¹ Exempt employees must be paid a salary and, in general, must have duties that involve either management or the exercise of independent judgment and discretion. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest unless those hours exceed 40 for the workweek. Extra pay for working weekends or nights is a matter of agreement between the employer and the employee (or the employee’s representative).

The FLSA does not require extra pay for weekend or night work or double time pay.

Overtime law is simple in theory, but complex in application. There are a myriad of questions that can arise in attempting to comply with the law, such as the following:

- ♦When is pay considered “hourly” versus “salaried”?
- ♦Are break times or vacation time factored into the “regular rate”? How about if the employee is provided room, board or another benefit? How are tips treated?
- ♦Must the employee be paid for training time or for attendance at meetings outside of work hours?
- ♦May a private employer provide “comp time” in lieu of overtime pay?
- ♦What constitutes an employee’s pay period, and must the pay period be the same for all employees?

These and many other issues create potential pitfalls for the employer who has not carefully analyzed the jobs performed by the workforce and the methods of payment of the employees.

The FLSA encourages employees who have claims for overtime pay to file suit; successful employees will almost certainly recover liquidated damages (in the same amount as the unpaid overtime) and reasonable attorney’s fees against the employer who has failed to abide by the law. In recent years, Food Lion grocery store chain paid \$16.2 million, UPS paid \$18 million, and Perdue Farms – headquartered on Maryland’s Eastern Shore, and in a lawsuit pursued in the Federal Court in Maryland – paid \$10 million to settle FLSA claims.

The FLSA permits employees to go back two years prior to the institution of litigation – three years if the violation of the FLSA is “willful” – to claim unpaid overtime wages. The FLSA definition of “employer” has been liberally construed to hold company presidents and owners, responsible for pay decisions, personally liable for the company’s FLSA violations.

Employers are not insulated from claims for overtime wages because they may have a written policy directing employees not to work overtime hours. The FLSA requires overtime pay for employees who are permitted or “suffered” to work overtime. 29 C.F.R. § 785.11. In this context, “suffered”

means that an employer knows the employee is working the overtime hours and takes no affirmative steps to stop it, or should know it but fails to discover it.

What are the Major FLSA Exemptions?

The so-called “white collar” exemptions are for those employees who are employed in bona fide “executive,” “professional,” and “administrative” capacities.² 29 U.S.C. § 213 (a)(1); *see generally*, 29 C.F.R. Part 541. In general, to qualify for a white collar exemption, an employee must be salaried and primarily perform exempt duties. Typically, “executives” manage two other employees and have authority in hiring and firing decisions; “professionals” are those with advanced degrees, artists and teachers; “administrative” employees must exercise discretion and independent judgment on matters of significance. The white collar exemptions are supplemented by a variety of lesser known and industry-specific exemptions, such as for workers providing home companionship services, employees paid primarily on commission who work for a “retail or service establishment”, and many drivers, driver’s helpers, loaders or mechanics. Some exemptions apply to specific types of businesses and others apply to specific types of work.

It is important to keep in mind that employees are presumed to be owed overtime pay under the FLSA. The burden rests with the employer to demonstrate that an employee is covered by one or more exemptions. Moreover, as the FLSA is a remedial statute intended to protect workers, it is afforded broad interpretation. Exemptions are to be narrowly construed. *A.H. Phillips, Inc. v. Walling*, 423 U.S. 490, 493 (1945) (“[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.”) Further, the employer must prove the exemption by clear and convincing evidence. *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993).

What Types of FLSA Cases are Most Common?

Misclassification

The most common source of FLSA cases stems from misclassification, in which non-exempt employees are improperly classified as exempt. Within misclassification cases, the administrative exemption causes the most confusion and, therefore, spawns the most litigation. While the “executive” and “professional” exemptions have developed fairly well defined

contours, the “administrative” exemption’s vague description – essentially, requiring involvement in policy decisions affecting the company and the exercise of independent judgment and discretion – has resulted in extensive misclassification litigation.

Exemption issues are resolved on a case-by-case basis. Job titles are largely irrelevant; job duties are critical. One “account manager” may be exempt because she manages other employees or exercises independent judgment and discretion. Another “account manager” – even with the same employer — may not be exempt if her job duties do not qualify her as such.

Timekeeping

Of more recent interest is the issue of determining what hours are compensable for non-exempt employees. The FLSA requires the employer to maintain time records for all non-exempt employees, 29 C.F.R. § 516.2 (a) (7). Litigation often ensues over the employer’s determination that certain time spent by employees is not compensable for purposes of calculating overtime wages due. In November 2005, the Supreme Court ruled that employees must be paid for the time they spend putting on and taking off protective gear (so-called “donning and doffing” of work equipment), as well as time spent walking to their workstations. *Alvarez v. IBP, Inc.* and *Tum v. Barber Foods* (Nos. 03-1238 and 04-66, November 8, 2005). The extra few hours per week may not represent a huge recovery for the individual plaintiffs in these cases. However, the implications for an employer who may employ hundreds or even thousands of workers who are required to put on and take off safety goggles, safety gloves, earplugs, steel-toed boots, hard hats and the like – each of whom may now seek to go back up to three years to recover for overtime pay due – are ominous and obvious.

What Steps can Employers Take to Avoid Being Sued Under the FLSA?

The best steps an employer can take to avoid future FLSA liability is to take a hard look at what job functions its employees are actually performing. Look past job descriptions and titles and determine whether the job duties performed qualify the employee for exempt status. Look also at the method of payment – is the employee being paid on an hourly basis (or other basis correlating compensation to hours worked) as opposed to a salary or, if salaried, at the rate of at least \$455/week?³ Does compensation vary from week to week based

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on the amount of time worked? Finally, are overtime payments being calculated accurately? For example, are commissions and bonuses figuring into the “regular” and therefore the overtime rates?

Regular audits of the position descriptions in an employer’s workforce will minimize the chance that overtime liability will become an issue. If problems are discovered, discrete remedial measures can be implemented.

Beyond these practical steps, the best maxim to avoid FLSA litigation is simple: treat your employees right. The vast percentage of FLSA lawsuits arise because an employee was fired without cause or let go for trumped-up reasons, and then seeks legal counsel. Reducing the number of disgruntled ex-employees will surely help to keep the prudent employer from finding itself on the receiving end of an FLSA lawsuit.

Footnotes

¹ *Maryland’s Wage and Hour Law, Maryland Code Annotated, Labor and Employment Article §§ 3-401 et seq., substantially mirrors the FLSA in its requirement of overtime pay for hours worked over 40 in a given work week by non-exempt employees. State laws may be more stringent than the FLSA in this regard. For example, California law requires overtime pay after 8 hours are worked in a day.*

² *Significant exemptions exist for outside sales persons (FLSA, § 213(a)(1) and, of particular importance in recent years, computer professionals (FLSA, § 213(a)(17). However, a consideration of these exemptions is beyond the scope of this article.*

³ *The August 2004 amendments to the FLSA regulations established \$23,300 – approximately \$455/week – as the floor below which even salaried employees must receive overtime pay, regardless of job duties.*

The Fiduciary Duty of Loyalty and the Departing Employee

*By David G. Ross, Esq.
Thatcher Law Firm, LLC*

What exactly *is* the fiduciary duty of loyalty, and what does it mean to the employee who’s leaving to work for a competitor or start a competing business? According to Maryland case law, the fiduciary duty of loyalty requires the employee to “act solely for the benefit of his employer in all matters within the scope of his employment, avoiding all conflicts between his duty to the employer and his own self-interest.” *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 38 (1978). On the surface, this standard sounds simple enough. You would be correct in assuming that this fiduciary duty prohibits a sales representative from using his position to divert sales opportunities from his employer to himself. You’d also be correct in concluding that the duty of loyalty protects an employer from the corrupt corporate officer who receives secret kickbacks from its vendors or misappropriates its trade secrets.

But things get murkier in the case of an employee who is simply preparing to move on to the next professional opportunity – assuming, of course, that he or she is not bound by a non-compete agreement. Indeed, isn’t an employee who interviews with her employer’s arch-competitor really putting her own self-interest above the interests of her employer? And what about the worker who wants to start his own competing business? Must he wait until he’s unemployed before he can even look into financing, talk to potential partners, or search for office space?

The good news for employees is that the “duty of loyalty” doctrine has limits, as the courts recognize that the need to prevent employees from abusing their employers’ trust and confidence should be balanced by the employees’ legitimate interest in career advancement. First, it should be noted that the employee’s duty of loyalty, like his or her other fiduciary duties, exists only for the duration of the employment. That is, the duty expires when the job does. Second, an employer may recover for breach of the duty of loyalty only where it has actually suffered injury. Third, in most circumstances, an employee may begin *preparing* to compete even before the employment’s termination. He or she may, without breaching the duty of loyalty, search for another job prior to leaving his current position. A group of employees may agree to leave together, such as when a partner at a law firm leaves with his associates [A]n employee may discuss job offers with

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his circle of friends and the group may debate whether to leave together. Such discussions are a normal part of workplace intercourse . . . The employee may also advise current customers that he is leaving. . . . Departing employees may purchase a rival business or equipment, secure land options, and obtain financing for a prospective new business.

(Citations omitted). *Quality Systems Inc. v. Warman*, 132 F.Supp.2d 349, 354 (D.Md. 2001).

Even the “preparation” exception has limits, however. Generally, preparations to compete will breach the duty of loyalty to the extent that they involve “fraudulent,” “unfair,” or otherwise “wrongful” acts. For example, the “preparation” privilege does not extend to an employee’s misappropriation of the employer’s valuable trade secrets for use in his new business. Further, although an employee may discuss job offers with her “circle of friends” and leave the company with them, she may not, with the purpose of destroying a key part of the employer’s business, use her position to actively solicit employees outside of that circle. In addition, although the soon-departing employee may inform customers that she is leaving, she usually must wait until after her official termination date to solicit their business in competition with the employer.

The limits to the “preparation” privilege are illustrated in *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357 (1962), cited in *Insurance Co. of N. Am. v. Miller*, 362 Md. 361 (2001), in which an employer successfully sued a group of former employees who had surreptitiously used their positions in the company to divert a lucrative business opportunity to their new start-up company. C-E-I-R was a provider of consulting services related to complex data processing systems, and the defendant employees, collectively, had been responsible for negotiating government contracts, managing the company’s commercial systems department, and performing the actual services. Those individuals, each of whom had an agreement preventing the publication or disclosure of data or information to his employment, played important roles with regard to a short-term consulting contract between C-E-I-R and its governmental client, the Bureau of Old Age and Survivors Insurance. C-E-I-R and the individual defendants all understood that this short-term contract might lead to a long-term relationship between C-E-I-R and the Bureau. They also understood that, although the Bureau would let future contracts out on competitive bids, C-E-I-R’s experience with the Bureau could put it in a favored position over other bidders.

What C-E-I-R did not know, however, was that these employees were secretly preparing to start Computer Dynamics Corporation, a new company that would compete with C-E-I-R’s commercial services department. Indeed, exploiting their relationship with the Bureau and their thorough familiarity with its needs, they secretly told a Bureau representative that they were forming a new company and would like to be considered for future business. Moreover, in order to increase their chances of obtaining this important client for their new business, the individual employees secretly recruited other C-E-I-R employees who had directly worked on the Bureau project. They ultimately succeeded in obtaining an invitation from the Bureau to submit bids.

The Maryland Court of Appeals, reversing the Circuit Court’s denial of injunctive relief and consequential damages to C-E-I-R, held that the individual defendants had engaged in the subject activity while still employed by C-E-I-R – meaning they were bound by a duty of loyalty at the time – and that the activities amounted to improper “solicitation” of customers in breach of the duty. In so doing, the Court stated as follows:

There would appear no precise line between acts by an employee which constitute mere preparation and those which amount to solicitation. However indefinite that line may be, we feel that the [defendants] crossed over the line into the area of solicitation forbidden to the loyal employee. *Id.* at 367.

This conclusion was based not on the communications alone, but on the totality of the circumstances, including the secrecy in which the individual defendants operated, the solicitation of C-E-I-R’s employees, and the fact that the defendants used C-E-I-R’s confidential information after agreeing in writing not to do so. The Court determined that these factors, taken in sum, were wrongful and gave the former employees an unfair competitive advantage over C-E-I-R.

Given the lack of a clear “bright line” with regard to the “preparation” exception to the duty of loyalty, an employee who plans to leave his or her employer should proceed with caution until the employment relationship is officially terminated. Although an employee is entitled to and often needs to engage in a certain degree of preparatory activity, he or she should refrain from taking actions that would compromise the employer’s trust or confidence. Once the employment relationship has ended, however, the employee may engage in lawful competition without fear of breaching this fiduciary duty.

Sanctions for Deleting and Over-writing Electronic Information:

Broccoli v. Echostar Communications Corp.

*By: David Wachtel
Bernabei & Katz, PLLC*

There may be no hotter procedural topic in the federal courts than what steps parties, in particular organizational parties, must take to retain electronic materials in anticipation of litigation. Proposed changes to the Federal Rules of Civil Procedure, if approved, will re-frame this issue, but a recent opinion from the District of Maryland illustrates one employer's clearly inadequate approach.

The District Court Grants Sanctions for Destruction of Records Pursuant to Current Rules of Civil Procedure

In Broccoli v. Echostar Communications Corp., 229 F.R.D. 506 (D. Md. 2005) (Davis, J.), a jury awarded \$9,668.64 in damages to the plaintiff on breach of contract and Maryland Wage Payment and Collection Act claims, but found for the defendants on the plaintiff's Title VII (sexual harassment and retaliation) and tortious interference with prospective economic advantage claims. During discovery, the plaintiff had filed a motion for sanctions against his former employer, Echostar, alleging that the company failed to preserve records and documents critical to the case. In a letter order issued to counsel prior to trial, the Court granted the motion. The Court condemned the wanton and inexplicable behavior of the corporate defendants in failing to preserve documents relevant to customary business decisions under circumstances in which a reasonable person would fully appreciate that litigation was a real likelihood. As a result, the Court limited Echostar's ability to present evidence supporting its reduction in force justification for terminating Broccoli, and granted Broccoli's request for an adverse instruction based on spoliation of evidence. The Court deferred until after trial an opinion on this ruling and on the plaintiff's request for attorneys' fees and costs as a sanction under Rule 37 for Echostar's discovery violations.

On August 4, 2005, the Court issued its opinion. The opinion first described the extraordinary email/document retention policy at Echostar. Under the policy, sent emails were forwarded to the deleted items folder after 7 days; all emails in the deleted items folder were removed after 21 days. Thus, sent emails older than 21 days were forever unretrievable.

Additionally, all electronic files of former employers were completely deleted 30 days after the employee le[ft] Echostar. The Court labeled this business practice a risky but arguably defensible in the absence of potential litigation, but held that a party has an affirmative duty to preserve evidence when the party is placed on notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation. Echostar attempted to argue that this duty was not triggered until December 20, 2001, when Broccoli's girlfriend, in a letter, claimed that Broccoli's termination was the result of discriminatory conduct. The Court disagreed, holding that the duty was triggered eleven months earlier when the plaintiff reported sexual harassment by another employee to two of his supervisors, who testified that they relayed these complaints to their own supervisors at Echostar. Broccoli also had memorialized his belief that he was terminated in retaliation for his complaints of sexual harassment on November 28, 2001, although no one in upper management recalled seeing that document. The Court concluded that evidence of a regular policy at Echostar of deep-sixing' nettlesome documents and records (and of management's efforts to avoid their creation in the first instance) is overwhelming. As a result of the Company's failure to suspend the operation of its data destruction policies, a large group of relevant documents were not preserved. These included: (1) employment-related documents relevant to Broccoli and his termination in November 2001; (2) corporate records relating to the alleged dissolution of the regional teams' that, according to Echostar, resulted in Broccoli's termination as part of a bona fide reduction in force; (3) correspondence by corporate decision makers pertaining to Broccoli's termination; and (4) emails and other electronic communications exchanged during Broccoli's employment and termination.

The Court held that Echostar clearly acted in bad faith in its failure to suspend its email and data destruction policy or preserve essential personnel documents in order to fulfill its duty to preserve the relevant documentation for purposes of potential litigation. The Court found it indefensible that such basic personnel procedures and related documentation were lacking at a large corporation and held that Broccoli was prejudiced in his ability to litigate his case. In addition to the limitations on Echostar's defense and the adverse inference on spoliation, the Court awarded Broccoli \$16,097 (of a requested \$26,109.50) in attorneys' fees and costs in litigating the motion for sanctions.

Proposed Amendments to Federal Rule of Civil Procedure 37 May Re-Frame the Standard for Granting Sanctions for Destruction of Electronic Records

A recent proposal to amend the Federal Rules of Civil Procedure regarding discovery of electronic materials is currently awaiting review from the United States Supreme Court. The Judicial Conference of the United States has approved proposed amendments to Rules 16, 26, 33, 34, 37, 45, and Form 35 and forwarded the amendments to the Supreme Court, which must review them by May 1, 2006. If the Supreme Court approves the amendments, Congress will consider them and, if ultimately approved, the rule changes could take place before the end of 2006.

The proposed rule would add a subsection to Rule 37 f) that will create a limited safe harbor from sanctions for automated destruction of electronic records in limited circumstances. According to the Advisory Committee Note accompanying the amendments, the rule attempts to address a problem arising from a distinct feature of computer operations, the routine alteration and deletion of information that attends ordinary use. The proposed amendment reads:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The new rule will not necessarily simplify litigation over failure to retain electronic records. More likely, it will reframe the debate so that parties seeking and opposing sanction will litigate the meaning of routine, good-faith operation of systems.

For example, if the proposed amendments had been in effect at the relevant time, the District Court might have found that the employer was not entitled to a safe harbor because the frequent over-writing in Broccoli was not routine. Some of the document retention problem in Broccoli appeared to stem from a system that had incredibly brief time-tables before files were deleted and over-written. The clear implication from the Court's opinion is that such settings were susceptible to human control, and not dictated by computer design. The Court noted that the time period before deletion could (and probably should) have been lengthened as a matter of business practice and deletion surely should have been suspended once Echostar received a letter related to potential legal claims.

Although the good faith standard leaves room for judicial interpretation, it is clear that it would not have affected the outcome of the sanctions motion in Broccoli. The Court explicitly held that Echostar had been in bad faith. Among the questions created by the proposed amendment to Rule 37(f), is whether failure to modify or suspend the routine operation of the information system in the face of a litigation hold will always amount bad faith. The Note states a general rule: Good faith . . . *may* involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation (*italics added*).

Arguably the Note describes only one instance in which a party *must* modify or suspend the operation of the system. It states, "The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." This standard for culpability is the Advisory Committee's acknowledged attempt to split the difference between negligence and intent. Such selective loss would arguably occur when a party knows that specific information subject to a litigation hold will be lost through the routine operation of the system but the party fails to suspend or modify the operation of the system to preserve the material. The result is less clear when a party is aware of a litigation hold but does not know whether specific information relevant to the litigation will soon be lost through the routine operation of its system. Similar questions will arise in large organizational parties, when a group of employees in one part of the organization knows of specific records relevant to potential litigation, but lacks knowledge of the intricacies of the information system or of possible litigation, while those with such knowledge are not aware of the specific information about to be lost.

These questions, among others, will be litigated if the proposed rule is approved. Until then, and even after, attorneys representing employees in the District of Maryland who make clear and specific demands that a potential defendant retain electronic records can expect either compliance or an opportunity for an adverse inference instruction in their favor. Attorneys advising employers should carefully consider Broccoli in weighing document retention policies and practices in the face of notice of a potential employment-related litigation.

Proving a “Regarded As” Disabled Case under the ADA

By: Elaine L. Fitch
Kalijarvi, Chuzi & Newman

In 1974, Congress amended the definition of disabled persons protected by the Rehabilitation Act (hereinafter “Act”) to include those individuals who are regarded as disabled. School Board of Nassau County, Florida v. Arline, 480 U.S. 273, 278 (1987). “The amended definition reflected Congress’ concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from ‘archaic attitudes and laws’ and from ‘the fact that the American people are simply unfamiliar with and insensitive to the difficulties [confronting] individuals with handicaps.’” *Id.* at 279. The purpose of the amendment was to protect individuals whose impairment might not substantially limit them (and thus qualify as a “disability” under the Act), but which could limit their ability to work because of the negative reactions, prejudiced attitudes, or ignorance of others to the impairment. *Id.* at 283, 284. Though this amendment was passed more than 30 years ago, it is just as relevant today.

Under the Act as currently written, a plaintiff must show that he:

- (A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) [has] a record of such an impairment; or
- (C) [is] . . . *regarded as having such an impairment.*

42 U.S.C. § 12102(2) (emphasis added).¹ The EEOC’s regulations further define “regarded as having such an impairment” in a tripartite manner as follows:

“Is regarded as having such an impairment” means [that the individual] has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or has none of the impairments defined in paragraph (a)(2) of this sec-

tion but is treated by an employer as having such an impairment.

29 C.F.R. § 1614.203(a)(5). One court fairly described the most commonly encountered prong of the tripartite analysis:

“[A] person is ‘regarded as’ disabled within the meaning of the ADA if a covered entity mistakenly believes that the person’s actual, nonlimiting impairment substantially limits one or more major life activities.” *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521-22 (U.S. 1999). This inquiry “turns on the employer’s perception of the employee and is therefore a question of intent, not whether the employee has a disability.” *Colwell [v. Suffolk County Police Department]*, 158 F.3d 635, 646 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999)].

Maldonado v. R.J. Reynolds Tobacco Co., 1999 U.S. Dist. LEXIS 22062, *15 (S.D.N.Y. 1999).

Thus, an employee must still address the issue of a substantial limitation, even though they do not actually suffer any such limitation. A physical or mental impairment is substantially limiting if the affected individual is:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). Thus, the employee has a two pronged burden: he must ultimately show that he is not actually substantially impaired in a major life activity, and that his employer perceived a condition to be substantially limiting.

The vast majority of regarded as cases implicate the major life activity of working. When the issue is whether the employer regarded the employee as substantially impaired in the major life activity of working, the employee must show that he is perceived as being “significantly restricted in the ability to perform *either* a class of jobs *or* a broad range of jobs in

various classes as compared to the average person having comparable training, skills and abilities.” Sutton v. United Air Lines, 527 U.S. 471, 491 (1999), citing 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). This language is exceedingly important because many legal opinions in various jurisdictions have conflated the two methods of proving a substantial impairment in the major life activity of working. An employee will not carry his burden if he can only show that he is perceived as being unable to perform a particular job. Id. Factors to be considered when making this analysis include “the geographical area to which the individual has reasonable access, and ‘the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified.’ [29 C.F.R.] §§ 1630.2(j)(3) (ii)(A), (B).” Id. at 491-92.

While certain jurisdictions emphasize the use of experts to establish the class or range of jobs from which an employee is precluded, this is by no means a requirement in a “regarded as” case. Because the issue is primarily a question of the employer’s intent, rather than proving an actual imitation, astute deposition questioning of the relevant management officials is often sufficient. Although many cases focus on the employee’s ability (or inability) to identify a “broad range of jobs” to demonstrate that he is unable to work, the regulations provide that “one is disabled if one is significantly restricted in one’s ability to perform most of the jobs in one’s geographical area that utilize training, knowledge, skills and abilities similar to the job one has been disqualified from performing.” Williams v. Phila. Housing Auth. Police Dep’t., 380 F.3d 751, 764 (3rd Cir. 2004).

I commend to your attention the following fruitful “regarded as” cases:

Rodriguez v. Conagra Grocery Products Co., (5th Cir. 2005). In this recent case (November 15, 2005), the court granted partial summary judgment for the plaintiff based upon direct evidence that the employer perceived the plaintiff’s diabetes as precluding him from holding any job at Conagra (contrary to the testimony of plaintiff’s doctor).

Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998). In Cline, the employee had surgery for a brain tumor. Shortly before Cline was scheduled to return to work with no medical restrictions, Wal-Mart demoted him because of his health and because it believed he could not handle the stress of a supervisory position. The court upheld a jury verdict in favor of Cline based on its belief that Wal-Mart perceived the plain-

tiff to be incapable of handling stress or lengthy hours, thereby disqualifying him from handling supervisory tasks.

Williams v. Phila. Housing Auth. Police Dep’t., 380 F.3d 751 (3rd Cir. 2004). In this case the court held that a computer programmer who developed a vision impairment rendering her unable to distinguish print on computer screens was substantially limited in working, because her impairment prevented her from working in the class of jobs requiring use of a computer.

Doebele v. Sprint/United Management Co., 342 F.3d 1117 (10th Cir. 2003). Based upon a myriad of supporting facts, the court determined that the employee had presented a question of fact for the jury regarding whether her employer regarded her as disabled.

McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001). The court held that there was a factual controversy over whether the employer regarded the employee as limited in her ability to work in the “class of jobs comprising law enforcement.”

Maldonado v. R.J. Reynolds Tobacco Co., 1999 U.S. Dist. LEXIS 22062 (S.D.N.Y. 1999) The court found a genuine issue of material fact as to whether the defendant regarded the plaintiff as unable to work in a class of jobs where the defendant granted the plaintiff’s disability leave, denied the plaintiff’s request to return to work because of his impairment, and refused to place the plaintiff in another position.

Heyman v. Queens Village Comm. for Mental Health for Jamaica Community Adolescent Program, Inc., 198 F.3d 68 (2^d Cir. 1999). The court was persuaded that a reasonable trier of fact could conclude that the defendant regarded the plaintiff as suffering from a physical impairment (lymphoma) that significantly restricted his ability to perform the major life activity of work.

Footnote

¹ *The citation is to the Americans with Disabilities Act, which for all relevant intents and purposes is synonymous with the Rehabilitation Act.*

The Trouble With Trebles
or
How Much Can A Worker Collect Under
Maryland's Wage Payment And Collection Law?

By: *Debra Gardner*
Legal Director of the Public Justice Center
www.publicjustice.org

A worker whose employer fails or refuses to pay wages due for work performed is entitled to relief under Maryland's Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. §§ 3-501 through 3-509. The statute contains two separate provisions setting forth the relief an aggrieved worker may obtain: Section 3-507.1(a) authorizes a private suit for recovery of the unpaid wages. Section 3-507.1(b) separately allows, where the wages were not withheld as the result of a bona fide dispute, an award of "an amount not exceeding 3 times the wage..." In *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533 (2000), the Court of Appeals indicated that the award under section 3-507.1(b) is discretionary, not mandatory, and a question for the jury. 357 Md. at 550. Throughout that decision, the Court referred to the discretionary treble damages award as an "additional" amount that may be awarded, *in addition to* recovery of the unpaid wages themselves awarded under section 3-507.1(a). Another decision of the high court, *Baltimore Harbor Charters, Ltd. v. Ayd*, 365 Md. 366 (2001), contained similar references. However, that specific question was not in contention in these cases.

Last year, the Court of Special Appeals rendered a reported decision addressing the issue. In *Stevenson v. Branch Banking & Trust Corp.*, 159 Md. App. 620 (2004), a three-judge panel of the intermediate court held that the award of discretionary treble damages was inclusive of, rather than in addition to, the recovery of the unpaid wages authorized under the preceding section of the statute. The court relied on what it deemed to be the plain language of the statute. 159 Md. App. at 659. It rejected the characterizations of the Court of Appeals as dicta. It relied instead on an analogy to a provision in Maryland's Security Deposit Law, Md. Code Ann., Real Prop. § 8-203. That statute provides that, where a landlord wrongfully withholds a tenant's security deposit after the end of a tenancy, "the tenant has an action of up to threefold of the withheld amount..." *Id.* at §§ 8-203(e)(4), 8-203(h)(3)(ii). As might well be expected, the Court of Appeals has interpreted the security deposit statute to allow a total of triple the

amount withheld in a suit over a security deposit. *Rohrbaugh v. Estate of Stern*, 305 Md. 443 (1986). However, the wording of the security deposit statute is significantly different from that of the Wage Payment and Collection Law, and therefore the *Rohrbaugh* decision does not appear to be an appropriate foundation for a statutory interpretation of the wage law. The security deposit statute does not contain two separate provisions, one authorizing an award of the withheld deposit and the other authorizing separately an amount up to three times the withheld deposit. It contains only one provision authorizing an action for up to three times the withheld deposit. Earlier this year, the U.S. District Court of Maryland issued a decision in *Rogers v. Savings First Mortgage, LLC*, 362 F Supp. 2d 624 (2005), following *Admiral Mortgage* in characterizing the treble damages as an additional amount that may be awarded by the jury. 362 F. Supp. 2d at 648-49. But again, that specific question was not before the court.

There was no petition for certiorari filed seeking review by the Court of Appeals in the *Stevenson* case. Prior to that decision, many trial courts in Maryland interpreted the Wage Payment and Collection Law in accord with *Admiral Mortgage*. Workers' rights advocates look forward to the day when the Court of Appeals will have the opportunity to resolve this important question.

The PJC advocates for low-wage workers, among others, using a variety of legal strategies, including litigation, appeals, legislation, and community education. Since 2000, the PJC has pursued an Appellate Advocacy Project, specifically focusing on presenting legal issues of importance to the poor and otherwise underrepresented to state and federal appellate courts. This project represents parties in appeals, filed amicus briefs, and supports other advocates in appellate advocacy through consultation, moot arguments, etc. Anyone interested in litigating the question explored in this article, or other issues that impact low-wage workers, and who would like assistance should feel free to contact the author at 410-625-9409 x228.

