

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*
Peter Guattery, *Chair-Elect*
Thomas J. Gagliardo, *Recording Secretary*



FROM THE CHAIR

By Glendora C. Hughes

The Labor & Employment Law Section Council had an extremely busy fall 2007. Council members worked on programs, served as panelists or presented seminars. I participated as a panelist for the Maryland Employment Lawyers Association (MELA) Conference held in September. Also in September, the council member, Al Palewicz chaired a brown bag lunch with the National Labor Relations Board, Region 5 Regional Director, Wayne Gold, and Assistant to the Regional Director, Steve Shuster.

In the month of October, council member, Daryl Van R. VanDeusen, Kathleen Cahill and I co-chaired a MICPEL program entitled, "Employment Discrimination: Dealing with Administrative Agencies and Handling Litigation in State and Federal Courts". Our Section in cooperation with the Business Law Section, participated in a conference on alternative dispute resolution, entitled the "Maryland Business Alternative Dispute Resolution Conference, Conflict Management: Making Business Better". The Labor & Employment Law Section sponsored a panel, "ADR in Employment Litigation: What Cases are Best Suited, When and How to Use It." The panel was chaired by former Section Chair, J. Michael McGuire and I also participated on the panel. I thank everyone for all of their hard work in participating and putting these programs together.

The new amendments to Article 49B, creating the election of civil actions and a private right of action went into effect October 1, 2007. These amendments apply to alleged violations that occurred on or after that date. The applicable regulations addressing the new amendments and an evaluation of the Maryland Human Relations Commission's Rules of Procedure (COMAR 14.03.01) will finally appear in the January 4, 2008, Maryland Registrar publication. There will be a 30 day comments period thereafter before the regulations become final.

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EDITOR'S CORNER

By Albert Palewicz

While the holidays were being enjoyed by all the rest of us, a group of diligent people at Ober, Kaler were working on articles for this edition of the newsletter. You will find the articles in this edition interesting and timely, as usual. Thanks to all those who worked on putting the newsletter together, and especially to Jerry Oppel for coordinating the effort.

The sponsor for the Spring issue will be McGuire Woods LLP, with Doug Topolski as coordinator. We look forward to another excellent issue from them.

We are always looking for new sponsors for the newsletter. If your firm, or any group which you can get together or to which you belong, wants to sponsor an issue, let me know at 410-962-2811 or albert.palewicz@nlrb.gov. New sponsors always get the first available issue. Thanks.

As Glendora notes in her article from the Section Chair, we are planning a number of events for the spring, leading up to the MSBA convention in Ocean City in June. The MICPEL program on discovery in employment discrimination should be particularly useful, as there have been a number of interesting developments in this arena, as with all discovery in the electronic age.

As those who practice with the NLRB are aware, there have been a number of recent changes and developments in the law in various areas. One of particular note is discussed in the final article of this newsletter, taken from another newsletter, with permission. It deals with the issue of employee use of an employer's electronic mail system for what would be protected concerted or union activity. In *Guard Publishing* the Board found such usage not necessarily protected. The article explains this more thoroughly, and should be of interest to all, even those who do not deal with unions as representatives of employees on a regular basis.

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FROM THE CHAIR (continued)

Upcoming events being worked on by the Section Council are a MICPEL program addressing discovery in employment discrimination cases. And a possible joint bar dinner meeting or program with local bars in Montgomery and Prince George's Counties.

I wish everyone safe and happy holidays and I look forward to working with you in the New Year.

EDITOR'S CORNER (continued)

As we begin the New Year, I would like to thank again all those who took part in the production of this Newsletter during 2007. The four issues of that year were up to our usual high standard, and all members are appreciative of the work done by the various authors to bring the information to all Section members. Again, if there is any group that wishes to sponsor an issue — law firm, public interest group, labor union group, and simply several people who want to focus on a particular aspect of labor and employment law — please let me know at albert.palewicz@nlrb.gov. There are openings in the calendar for new groups at all times, and we welcome new participants always.

Happy New Year, and may you all have great success in the coming year!

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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.

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ARTICLES

Supreme Court Review: 2007-08 Term

By: Matthew Green

The Supreme Court has granted *certiorari* in a number of employment and labor cases that it has agreed to review during its current term. Below is a brief review of a number of the employment cases the Court has agreed to decide.

Court to Decide When Plaintiffs May Present “Me Too” Evidence

In *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223 (2006), the U.S. Supreme Court will decide whether and when plaintiffs may present “me too” evidence in discrimination claims. Plaintiffs sometimes attempt to prove their claims of discrimination by calling as witnesses other current or former employees, who also allege they too were victims of the same type of discrimination the plaintiff allegedly suffered. Some courts have held such evidence inadmissible unless the other employee worked under the same supervisor during approximately the same period as the plaintiff. In *Mendelsohn*, the United States Court of Appeals for the Tenth Circuit held otherwise.

The plaintiff in *Mendelsohn* alleged she was terminated because of her age during a company-wide reduction in force (“RIF”). The district court decided to exclude evidence that other Sprint employees had been selected for termination because of their age during the RIF as well. The plaintiff, however, had attempted to introduce such evidence to show that as evidence of Sprint’s overall animus against older workers.

In rejecting the evidence, the district court relied on a prior Tenth Circuit case, *Aramburu v. The Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997). In *Aramburu*, the court had held that a plaintiff seeking to present testimony of other employees treated more favorably for violating the same or a similar workplace rule to show discriminatory intent, had to show that the complainant and other employees shared the same supervisor.

The Tenth Circuit in *Mendelsohn*, however, sharply limited the reach of its earlier decision in *Aramburu* and held that the “same-supervisor” rule applied only to disciplinary cases. In doing so, the court held that the rule made no sense in the context of a case alleging a company-wide policy of discrimination, of which all the employer’s supervisory employees were aware. According to the

appellate court, application of the rule in a case challenging a supposed company-wide policy could make it impossible for a plaintiff to prove a claim of discrimination based on circumstantial evidence. A plaintiff might be the only employee selected for a RIF by her particular supervisor; however, there might also be scores of other employees within the protected group who also were selected for a RIF because of the policy but by different supervisors. The court explained that to apply the rule in the RIF context would create a disparity in those cases where a plaintiff is fortunate enough to have other RIF’d employees in the protected group working for the same supervisor and those cases where the other RIF’d employees work for other supervisors. The court found such a disparity unfair.

Oral arguments before the Supreme Court are set for December 3.

What Constitutes a Charge of Discrimination Under the ADEA?

On November 6, the Supreme Court heard oral arguments in a case decided by the United States Court of Appeals for the Second Circuit, which held that a plaintiff’s intake questionnaire and multi-page verified affidavit were the equivalent to filing a “charge” of discrimination for purposes of the time-limit requirements contained in the Age Discrimination in Employment Act (“ADEA”). In *Holowecki v. Federal Express Corp.*, 440 F.3d 558 (2d Cir. 2006), the Second Circuit noted that EEOC regulations do not define the term “charge.” The regulations do, however, set forth what a “charge” must contain, which includes the name of the complainant, the name of the employer, and a description of the alleged discriminatory acts. The Second Circuit held that when a complainant files documentation with the EEOC that satisfies the regulatory requirements of what a charge must contain, that filing, itself, constitutes a charge.

The Second Circuit also adopted the “manifest intent rule” imposed by some circuits with regard to “charges.” That rule, which is not explicitly set forth in the statute or regulations, provides that for a written submission to the EEOC to constitute a charge, “it must manifest an individual’s intent to have the agency initiate its investigatory and conciliatory process.” Citing the Third Circuit, the Second Circuit contended that to constitute a charge under the ADEA, “notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act’s machinery.

FedEx had argued that the fact that the plaintiff also later filed an actual charge suggested that she did not intend for the intake questionnaire and affidavit to be considered her “charge.” The Second Circuit recognized that the Eighth and Eleventh Circuits had followed that logic, but rejected that reasoning. It stated that

nothing in the record suggested that by filing a formal charge, the plaintiff “was doing anything more than supplementing her earlier charge, or acting out of a surfeit of caution.”

May Government Employees Sue Under the ADEA for Retaliation? First Circuit Says No

The Court granted *certiorari* to resolve a split within the circuits concerning whether the ADEA bars a federal agency from retaliating against an employee who has filed an age discrimination claim. In *Gomez-Perez v. Potter*, 476 F.3d 54 (1st Cir. 2007), a United States Postal Service employee sued her government employer for age discrimination after a request for a transfer was denied. The plaintiff then alleged that after she filed a complaint with the EEOC, her employer retaliated by reducing her hours and harassing her.

The district court granted the government’s motion to dismiss on the grounds that the United States had not waived its sovereign immunity for retaliation claims brought under the ADEA. The First Circuit affirmed, but on different grounds. According to the court, the United States had waived immunity under the ADEA. The court held that the employee’s claim was still barred, however, because the ADEA did not include a substantive cause of action for retaliation by a government employer.

The court recognized that its decision conflicted with an earlier decision from the D.C. Circuit, *Forman v. Small*, 271 F.3d 285 (D.C. Cir. 2001). The D.C. Circuit had reasoned in *Forman* that it made little sense to contend that a federal employee could file a discrimination claim against her employer but then be fired or suffer other adverse action as a result. The D.C. Circuit explained that it found nothing in the ADEA that suggested Congress intended the federal workplace to be any less free of age discrimination than in the private workplace.

The First Circuit, however, disagreed. It noted that the ADEA did not contain an express provision relating to retaliation claims as did the ADEA provisions relating to private employers. According to the court, the difference in the language of the ADEA between the provisions relating to the private sector and the public sector was dispositive.

Court To Decide Whether 42 U.S.C. § 1981 Protects Against Retaliation

The Supreme Court has agreed to consider whether a plaintiff may bring a claim of retaliation under Section 1981 after enduring an adverse action for filing a race discrimination claim against an employer. In *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007), an African American restaurant associate manager alleged

he was fired for unlawfully discriminatory reasons and because he had complained to a district manager about his supervisor’s racially discriminatory treatment of another employee. The district court dismissed the plaintiff’s Title VII claims as procedurally barred and granted summary judgment on the plaintiff’s claim for race discrimination and retaliation. The employee appealed dismissal of his race and retaliation claims under Section 1981.

On appeal, the defendant argued that Section 1981 did not allow claims for retaliation but, instead, allowed only claims of race discrimination. Joining every other circuit that has addressed the issue, the United States Court of Appeals for the Seventh Circuit held that, as amended by the Civil Rights Act of 1991, § 1981 protects private employees who complain of race discrimination from retaliation from employers.

The Supreme Court has not yet set a date for oral arguments in the case.

State Disability Plan That Provides Lesser Benefits To Older Workers May Violate ADEA

The Court has agreed to hear a case decided *en banc* by the United States Court of Appeals for the Sixth Circuit to address whether the use of age as a factor in determining benefits under a retirement plan violates the ADEA. See *EEOC v. Jefferson County Sheriff’s Dep’t*, 467 F.3d 571 (6th Cir. 2006) (*en banc*). The plan at issue in the case is a public retirement plan and provides for “normal retirement benefits” and “disability-retirement benefits.”

Under the plan, when an employee is eligible for normal retirement benefits that employee is not entitled to disability benefits. Since age is a factor in determining whether an employee qualifies for normal retirement benefits, it indirectly serves to disqualify some employees from receiving disability retirement benefits. Moreover, the plan also provides additional benefits to employees who are eligible for disability benefits. Since employees who are of retirement age can never receive disability benefits, older workers are barred from receiving these additional benefits. The court concluded that the plan was facially discriminatory on the basis of age.

The case is set for argument before the Supreme Court on January 9, 2008.

Summary of Recent NLRB Decisions

By: Jerald J. Oppel and Stacy Bekman Radz

The year 2007 was an important one for the NLRB, with a number of 3-2 decisions on significant topics.

Oil Capitol Sheet Metal, Inc., 17-CA-19714, 349 NLRB No. 118

On May 31, 2007, the NLRB issued a 3-2 decision in *Oil Capitol Sheet Metal* decision which addressed the issue of union “salts.” A “salt” is a union member who is sent to a nonunion employer, by the union, to seek employment, with the intent of obtaining employment and then organizing the employees of his new employer. As a general matter, the employer is legally prohibited from refusing to hire or terminating a “salt” because of his union affiliation or activity. This NLRB decision created a new evidentiary standard for deciding on the length of the backpay period when the individual discriminated against is a “salt.” Until *Oil Capitol Sheet Metal*, the remedy available for the refusal to hire or for unlawful discharge of a “salt” included back pay from the date of discrimination until the employer made an offer of reinstatement (in cases where the employer refused to hire). The Board previously had presumed that if the “salt” had been hired, the “salt” would have remained on the job indefinitely. In construction industry cases, the Board had made a further presumption that the “salt” would have been transferred by the employer from job site to job site as projects were completed.

The majority in *Oil Capitol Sheet Metal* refused to apply those previous presumptions about expected length of service, finding that they were inconsistent with the reality of what actually occurs with “salting.” The Board observed that there are times when the “salts” only remained on the job until they were successful in their organizational efforts and then they leave to reorganize another company. There also are times when the union would allow the salt to stay at the company indefinitely. Thus, the NLRB concluded that the union is in a better position to state its intentions, and the Board ruled that the burden should be placed on the union to prove the expected length of service for any “salt” instead of imposing the burden on the employer to establish the contrary. The majority’s decision stated:

The traditional presumption that backpay should run from the date of discrimination until the respondent extends a valid offer of reinstatement loses force both as a matter of fact and as a matter of policy in the context of a salting campaign. Indeed, as discussed below, rote application of the presumption has resulted in backpay awards that bear no rational rela-

tionship to the period of time a salt would have remained employed with a targeted nonunion employer. In this context, the presumption had no validity and creates undue tension with well established precepts that a backpay remedy must be sufficiently tailored to expunge only actual, not speculative, consequences of an unfair labor practice and that the Board’s authority to command affirmative action is remedial, not punitive.

Additionally, the NLRB held that instatement to the job would not be required if the “salt” would have left the job before the NLRB’s decision.

Toering Electric Co., 351 NLRB No. 18

On September 29, 2007, in another 3-2 decision, the NLRB held that in order to qualify as a Section 2(3) employee, which protects individuals against discriminatory hiring based on union affiliation or activity, the applicant must be genuinely interested in seeking to establish an employment relationship with an employer. Although some “salts” may genuinely want to work for a non-union employer, many have no desire whatsoever and are simply testing to determine if an employer discriminates against union organizers. The NLRB’s decision in *Toering Electric* declared that “one can not be denied what one does not genuinely seek.” The Board ruled that the previously applied presumption that any applicant was entitled to protection against hiring discrimination was inconsistent with Section 2(3), which the Board found required “at least a rudimentary economic relationship, actual or anticipated, between employee and employer.” According to the Board, there is no actual or anticipated economic relationship if the applicants have no genuine interest in employment. The Board further reasoned that it is not protected activity when applicants submit their applications with no desire to seek work, but instead, seek only to create unfair labor practice charges.

Additionally, the NLRB ruled that the union bears the burden of establishing that the individual was genuinely interested in going to work for the employer. There are two components that must be proven:

- (1) There was an application for employment; and
 - (2) the application reflected a genuine interest in becoming employed by the employer.
- As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual ap-

plied for employment with the employer or that someone authorized by that individual did so on his or her behalf...As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer. In other words, while we no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence that an application for employment is anything other than what it purports to be.

The Board ruled that some evidence in the case before it demonstrated that the applicant had genuine interest in employment, while other evidence did not. Thus, the Board remanded the case for a determination under the Board's new analytical framework.

BE&K Construction Co., 351 NLRB No. 29

On September 29, 2007, the NLRB held in another 3-2 decision that regardless of the employer's motive for filing a lawsuit, filing and maintaining a reasonably based lawsuit does not violate the National Labor Relations Act ("NLRA").

This case was before the Board on remand from the United States Supreme Court. The issues presented before the Board were: (1) whether the Respondent violated section 8(a)(1) of the Act by filing and maintaining an unsuccessful lawsuit against the Charging Party Unions in federal district court, and (2) what standard the Board should apply in making its decision.

The background of this case is as follows. Complainant filed a lawsuit in the United States District Court for the Northern District of California against several unions alleging that the unions were engaging in activities which violated the NLRA and anti-trust laws. The district court granted the union's motion for summary judgment and dismissed the employer's suit. The 9th Circuit Court of Appeals affirmed that decision. The union then filed unfair labor practices charges stating that the lawsuit was retaliatory, and therefore unlawful. The General Counsel issued a complaint.

The Board, applying a test premised on the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, found that the employer's unsuccessful suit violated Section 8(1) because it was filed to retaliate against the Unions for engaging in protected

concerted activity. *BE&K Construction Company*, 329 NLRB 717 (1999). The United States Court of Appeals for the Sixth Circuit enforced the Board's decision.

The United States Supreme Court rejected the Board's analysis and reversed. It unanimously held that the NLRB cannot impose liability on an employer for filing a losing retaliatory suit, in that such actions include a substantial amount of petitioning. The Court rejected the Board's analysis on First Amendment grounds. The Court found that the threat of a NLRB adjudication was a burden on the First Amendment right to petition the government through the courts. Additionally, the Board's standard for evaluating the lawfulness of completed, unsuccessful lawsuits raised a difficult First Amendment issue. To avoid this difficult constitutional issue, the Court adopted a limited construction of Section 8(a)(1) and invalidated the Board's legal standard because it did not comply with the limited construction. The standard applied by the Board had exceeded the scope of Section 8(a)(1). The Court remanded the case to the Board for further proceedings that were consistent with its opinion.

The Board majority first highlighted the Court holding in *Bill Johnson's* that to protect the First Amendment right to petition, an ongoing reasonably based lawsuit could not be seen as an unfair labor practice even if its motive was to retaliate against the exercise of rights protected by the NLRA. Based on these principles, the Board held that these principles should be applied to both completed an ongoing law suits. Specifically:

This chilling effect on the right to petition exists whether the Board burdens a lawsuit in its initial phase or after its conclusion. Indeed, the very prospect of liability may deter prospective plaintiffs from filing legitimate claims. Thus, the same weighty First Amendment considerations catalogued by the Court in *Bill Johnson's* with respect to ongoing lawsuits apply with equal force to completed lawsuits. In sum, we see no logical basis for finding that an ongoing reasonably- based lawsuit is protected by the First Amendment right to petition, but that the same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail. Nothing in the Constitution restricts the right to petition to win litigants.

...Accordingly we find that just with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor practice. In determining whether a lawsuit is reasonably based, we will apply the

same test as that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.' *Professional Real Estate Investors*, 508 U.S. at 60.

In this case, the Board agreed with the Court's decision that the employer's lawsuit was reasonably based although it applied its new standard to the facts of the case. The suit was not shown to lack a reasonable basis although, in the end it was found to be unsuccessful. As such, the complaint was dismissed without evaluating the employer's motive for filing the suit.

***Dana Corporation/Metaldyne Corporation*, 351 NLRB No. 28**

On September 29, 2007, in another 3-2 decision the NLRB modestly modified its "recognition bar doctrine" in an attempt to protect the rights of employees to determine for themselves, in Board conducted elections, whether they would like to be represented in collective bargaining by a union, organized by their employer.

Under the former policy, an employer's voluntary recognition of a union, based on a showing of the union's majority status, prohibited a decertification petition filed by employees or a rival union's petition for a reasonable period of time. The reasoning was that stability of labor relations was promoted by a rule in which a voluntarily recognized union was insulated from challenge to its status while negotiating for a first collective-bargaining agreement.

In *Dana*, the Board ruled that although the basic justification for providing an insulated period is good, it does not warrant an immediate imposition of an election bar following voluntary recognition. Specifically, the Board held that "no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition." The union or the employer must promptly notify, in writing, the Board's regional office of the grant of voluntary recognition. The voluntary recognition must be in writing, describe the unit and set forth the date of recognition to serve as an election bar. A copy of the written recognition must be provided with the party's notice to the regional office.

Once the Board's regional office receives the notice, it will send an official NLRB notice for the employer to post in prominent workplace locations over the 45-day period informing employees of the recognition, advising them of their statutory right to be

represented by a union of their choice or by no union at all, as well as also advising them of their right to file a decertification petition supported by at least 30% of the unit employees or to support another union's election petition based upon a similar 30% or more showing within 45 days of the notice being posted.

If no petition is filed during the 45 day window and the notice requirement is satisfied, the recognized union's majority status will be irrebuttably presumed for a reasonable period of time to allow the parties to negotiate a collective bargaining agreement. The new rules will apply "regardless of whether a card-check and/or neutrality agreement preceded the union's recognition." The Board further held that the ruling would only apply prospectively.

The majority stated that they had modified the approach to the recognition bar in order to "provide greater protection for employees' statutory right of free choice and to give proper effect to the court-and Board recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election."

This case was brought by National Right to Work Legal Defense Foundation attorneys from employees of two automotive suppliers (*Dana* and *Metaldyne*) who were organized by the United Auto Workers Union. Since this ruling was to be applied only prospectively, the forcibly unionized employees in this case and other employees who filed similar decertification petitions after card-check cases, would remain unionized.

***Ryder Memorial Hospital et. al.*, 24-RC-8370**

In *Ryder*, the Board ruled on September 28, 2007 to modify the ballot forms used in secret ballot representation elections. The new ballot form will explicitly include language that asserts the Board's neutrality in the election process and disclaim the Board's participation in the alteration of any sample ballots. The disclaimer language will prevent any reasonable impression by employees that the Board endorses a particular individual in the election. Also, the Board no longer will be required to evaluate altered sample ballots on a case-by-case basis. Thus, the Board will no longer set aside an election based on a party's distribution of an altered sample ballot, as long as the altered sample ballot is an actual reproduction of the Board's sample ballot. However, if a party distributes a sample ballot which has been altered and does not contain the disclaimer language, the Board will rule that the deletion is intentional and hold the altered ballot as per se objectionable.

In this case, the altered sample ballot did not include the Board's new disclaimer language. As such, the Board required a case-

specific evaluation of the nature, contents and circumstances of the distribution of the altered sample ballot. The majority found that the ballot was not objectionable. The majority based its conclusion on the following facts: (1) the petitioner distributed the ballot the same way it distributed other campaign propaganda; (2) the ballot contained a portion of the disclaimer language that appeared on the Board's Notice of election; (3) it could be concluded by various markings on the ballot that the document was a photocopy of the Board's sample ballot; and (4) the Employer posted copies of the Board's Notice of Election, which contained the disclaimer language, throughout its facility.

Jones Plastic & Engineering Co. and United Steelworkers of America- Case 26 CA-20861

The *Jones* decision on September 27, 2007 addressed the issue of whether certain workers who had been hired to replace strikers were hired as permanent replacements, thereby making it easier for employer to exclude strikers from returning to their jobs.

In *Jones*, a majority of the plant's employees went on an economic strike, and the factory started hiring replacements by using its standard application process. The newly hired employees were under the assumption that they were being hired permanently. A little over two weeks after the strike began Jones sent letters to its striking employees advising them that they would lose their jobs to their replacements if they did not immediately return to work. The United Steelworker's arm of the AFL-CIO, the representative union for the plant, offered on behalf of the employees, an unconditional return to work which Jones rejected on the basis that they already had permanent replacements.

The strikers alleged that Jones' decision was an unfair labor practice based on the proposition that the at-will nature of the replacement's hiring meant the replacements were not permanent and the striker's former positions should still be available to them. The Board held that Jones Plastic & Engineering Company ("Jones") permanently hired the workers to replace the strikers. The new hires had signed forms and received comments by the human resources department about their permanent status. The Board rejected the argument that the replacement's at-will employment precluded permanent employment. The Board held the wording on the applications and that mutual understanding of permanency between the new hire and employer was sufficient proof to show permanency.

Potential Tort Liability for Attempting to Enforce an Unenforceable Restrictive Covenant

By: Sharon Snyder

Employment lawyers confront these facts time and time again. The situation is this – a lawyer receives a telephone call from a client who wants to enforce a restrictive covenant. Time is of the essence, and the client wants counsel to send a cease and desist letter to the new employer. In reviewing the restrictive covenant and learning about the underlying facts, the lawyer determines that an argument could be made either way that the covenant does or does not prohibit the former employee's work for his new employer. Or, perhaps, the former employee has gone to work for a competitor and the client suspects that the employee is breaching his or her obligations under a restrictive covenant but lacks proof that there has been a breach; however, the failure to take action if a breach is ongoing would cause significant harm. In either event, a court could rule against the former employer for one of the many reasons that courts refuse to enforce restrictive covenant agreements. Perhaps the covenant might be deemed to be too broad in geographic scope, or perhaps it extends for too long a period of time, or perhaps the covenant is written more broadly than is necessary to protect the legitimate interests of the employer, or maybe it is unclear whether the new employer fits within the restrictive covenant's definition of a "competitor."

Attorneys frequently respond to this situation by sending a letter to the former employee and his or her new employer, demanding that the new employer terminate its relationship with the former employee, with the expectation that a court ultimately would resolve any dispute over the enforceability of the restrictive covenant. This tactic, however, can create unexpected liability for the client (and perhaps the attorney).

Maryland recognizes the tort action for wrongful interference with contractual or business relationships in two general forms: inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic, or prospective, relationships. A cause of action for tortious interference with an existing contract is fairly easy to establish under Maryland law. In order to prove a case for tortious interference with an existing contract, a plaintiff must establish: 1) the existence of a contract between plaintiff and a third party; 2) the defendant's knowledge of that contract; 3) the defendant's intentional interference with that contract; 4) a breach of that contract by the third party; and 5) resulting damages caused to the plaintiff by the breach. *See, e.g., Fowler v. Printers II, Inc.*, 89 Md. App. 448, 466 (1991), *cert. denied*, 325 Md. 619, 602 A.2d 710 (1992).

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In order to prevail on a cause of action for tortious interference with prospective advantage, under Maryland law a plaintiff must establish: (1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) that were done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) with actual damage and loss resulting. *Natural Design, Inc. v. The Rouse Co.*, 302 Md. 47, 71 (Md. 1984) (citation omitted).¹ The Court of Appeals has held that wrongful or malicious interference with prospective advantage requires interference that is independently wrongful. “Wrongful or unlawful acts include common law torts and ‘violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.’” See *K & K Management, Inc. v. Lee*, 316 Md. App. 137, 166, 557 A.2d 965 (1989), quoting Prosser, *Law of Torts*, § 130, 952-53 (4th ed. 1971).

Given the elements of these two causes of action, the risk inherent in causing a new employer to terminate a relationship with an employee based on the threat to enforce an invalid restrictive covenant is apparent. It is uncertain, however, whether a Maryland court would consider interference with a former employee’s at-will employment with another employer under the rubric of tortious interference with contract or tortious interference with prospective advantage.² While the Maryland appellate courts have not addressed a claim for tortious interference by a former employee in a situation where the former employer erroneously attempted to enforce an unenforceable restrictive covenant, there is well-established, long standing law in other states holding that a former employer may be liable if a potential new employer withdraws an offer of employment based on the threat of litigation.

In some jurisdictions, the former employer will be liable, but only to the extent that the employer failed to act in good faith and with a reasonable basis to believe that the restrictive covenant was enforceable. See *Luketich v. Goedecke, Wood & Co.*, 835 S.W.2d 504, 199 Mo. App. LEXIS 1077 (Mo. App. 1992). Under this reasoning, the court focuses on whether the former employer who threatened to enforce the noncompete or restrictive covenant had the right to assert a claim that the covenant was enforceable. According to the *Luketich* Court, there is no liability for tortious interference which results in the termination of employment where the termination is caused by “the exercise of an absolute right, that is, an act which one has a definite legal right to do without any qualification.” “As a matter of law, . . . a former employer [is] justified in attempting to enforce its rights under [a] non-compete agreement . . . as long as [the former employer has] a reasonable, good faith

belief in the validity of the agreement.” *Luketich*, 835 S.W.2d at 508-09. Although “reasonableness” and “good faith” are issues of fact, this reasoning provides some protection for employers who rely on covenants that are ultimately found to be unenforceable.

In West Virginia, however, a former employer may be held liable for tortious interference with prospective relations if the restrictive covenant is unenforceable, even if the employer had a good faith reason to believe that the restrictive covenant or noncompetition agreement was enforceable. See, e.g., *Voorhees v. Guyan Machinery Co.*, 191 W.Va. 450, 446 S.E.2d 672 (W. Va. 1994). In *Guyan*, the former employer threatened to “go to the highest court in the land” to enforce a noncompetition agreement that had been signed by its former outside salesman. In response to the threat of litigation, the competitor that had agreed to hire the former employee advised him that he had to obtain a waiver of the noncompete from his former employer or the offer of employment would be withdrawn. When Guyan would not agree to a waiver, the former employee was fired by the competitor, and the employee sued Guyan for tortious interference.

Ultimately, Guyan was unable to convince a jury that it had satisfied its burden of “demonstrating a legitimate business interest warranting the protection of the restrictive covenant” and the noncompetition agreement was deemed unenforceable. The court reasoned from this decision by the jury that any attempt to enforce the unenforceable noncompetition agreement was wrongful and therefore constituted tortious interference. Moreover, the court found that an award of punitive damages was appropriate since the cease and desist letter sent by Guyan was intended to interfere with the former employee’s relationship with the new employer, and since the jury’s decision that the restrictive covenant was unenforceable meant, *ipso facto*, that the threat of litigation was wrongful and therefore constituted malice to support a punitive damages award. See *Voorhees*, 191 W.Va. at 456.

The well-established Maryland law on the tort of tortious interference, as well as these two lines of authority, make it imperative that counsel consider carefully whether a restrictive covenant or noncompetition agreement is likely to be enforceable before threatening a new employer with a lawsuit if it does not refuse to employ a former employee. Employers that insist on moving forward to interfere with a former employee’s employment, when it is unclear whether the applicable agreement bars that new employment, should be advised of the risk that their threat of litigation might well result in a successful tort claim back against them by the employee whose ability to earn a livelihood has been adversely affected.

Footnotes

¹ The Restatement (Second) of Torts defines Tortious Interference With Prospective Contractual Relations as:

One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

- (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
 - (b) preventing the other from acquiring or continuing the prospective relation.
- § 766B.

² Cases involving claims by a former employer that a new employer had interfered with its employment relationship with an at-will employee generally have been analyzed as a claim for tortious interference with prospective advantage and required proof of wrongful conduct by the new employer. *See, e.g., Fowler v. Printers II*, 89 Md. App. at 468-71. It is not clear that the same test should or would be applied in a case where a former employer erroneously caused a new employer to terminate a former employee's employment based on an invalid restrictive covenant.

Commissioned Salespeople & The Fair Labor Standards Act: Non-Compliance is a Costly Matter

By: Carla Murphy and Sharon Snyder

Many employers erroneously believe that there is a general exemption from the minimum wage and overtime requirements for so-called "commission" sales employees. While this is true under Maryland law - the state minimum wage and overtime requirements do not apply to individuals who are compensated on a commission basis - no such broad exemption exists under the Fair Labor Standards Act. The FLSA does provide certain limited exemptions from both minimum wage and overtime for "outside salesmen"; the FLSA also provides a limited exemption from overtime (but not minimum wage) for commissioned employees of "retail and service establishments." Qualifying for either of these exemptions, however, is much more difficult than employers realize. Moreover, even assuming that an employee's job responsibilities make him or her eligible for the exemption, the wage payment structure that can be required by the FLSA for these employees is quite complex and often misapplied by employers. As a result (and perhaps because liquidated damages and attorneys'

fees are recoverable by an employee in a successful wage payment action), there has been a recent flood of claims on behalf of employees who were compensated on a commission basis and who assert, often correctly, that they were underpaid. Therefore, it is critical that counsel for employers and employees understand exactly what is required.

Wage & Hour Basics

Any analysis of how a salesperson should be compensated must start with the FLSA basics. Unless an employee is specifically exempted from federal and state wage and hour regulations, he or she must be paid at least minimum wage, which is \$5.85/hr. under federal law and \$6.15/hr. in Maryland. In addition, an employee also must be paid overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half his or her "regular rate of pay." Compliance with these provisions can be very costly for employees who receive sizable commissions since an employee's "regular rate of pay" under the FLSA is computed by dividing the total remuneration paid to the employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid. That total remuneration includes commissions. Thus, if an employee's total remuneration in a week was a \$10,000 commission which was earned during a 45-hour workweek, the employee's "regular rate of pay" for purposes of overtime would be \$222.23/hour. If the employee is not exempt from overtime, the employer would be required by the FLSA to supplement the \$10,000 commission by paying an additional \$1,667 for the 5 hours of overtime worked. An exemption from overtime pay thus is critical for employees who earn substantial commissions because their "regular rate of pay" is determined by including commissions.

The Outside Sales Employee Exemption

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as *bona fide* executive, administrative, professional and outside sales employees. Many employers assume - incorrectly it turns out - that sales staff who visit customers in the field to make sales automatically qualify for the FLSA's "outside sales" exemption even if the employees spend much of their time in the office or in their homes, making telephone calls and generating leads.

A recent case from the United States District Court for the District of Maryland, *Schultz v. All-Fund, Inc.*, 2007 U.S. Dist. LEXIS 59300 (D. Md. Aug. 13, 2007), has an excellent discussion of the applicable law and demonstrates the requirements and perils associated with the outside sales exemption. That

case involved claims by the former co-branch managers of All-Fund, Inc. and Amerifund Financial, Inc. who were paid on a straight commission basis for loans they originated. The defendants were two financial services companies, an industry that frequently pays its sales staff on a straight commission basis and which has been the recent subject of many wage claims by aggrieved sales employees.

As is the practice with many financial services companies, if the plaintiffs did not close a loan, they did not receive any compensation for work they performed. Consequently, there were pay periods during the loan officers' employment in which they did not receive any compensation at all even though they had worked during those pay periods to generate business that might pay a commission at a later date. In addition, neither the defendants nor the plaintiffs kept any concurrent record of the hours that the plaintiffs worked, presumably because the employees were being paid on a commission basis (instead of hourly), and the employer therefore believed the records were unnecessary.

In response to the lawsuit, the defendants argued that the former employees were exempt from both minimum wage and overtime pursuant to the outside sales exemption in Section 13 (a)(1) of the FLSA. Under the statute, in order to qualify for the outside sales exemption, the following criteria must be satisfied:

1) the employee's primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

2) the employee must be customarily and regularly engaged away from the employer's place or places of business.

The first prong of this two-part test is easy to satisfy since it basically only requires that the employee be engaged in sales. The second prong of this test, however, is much more difficult to satisfy than employers often realize. The applicable regulations, which define what it means to be "customarily and regularly engaged in sales away from the employer's place of business," state:

The outside sales employee makes sales at the customer's place of business, or, if selling door-to-door, at the customer's home.

C.F.R. § 541.502.

Perhaps even more important than how the regulations define outside sales is what the regulation says will not constitute outside sales:

Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

Applying these legal principles, the Schultz Court granted the employees' motion for summary judgment and awarded more than \$100,000 to the two former mortgage loan officers for their employers' failure to pay minimum wage and overtime.

The parties appeared to agree that plaintiffs' primary duties involved making sales and therefore satisfied the first prong of the two-part test. The dispute centered on whether the employees' job responsibilities satisfied the second prong, i.e., whether they were regularly and customarily engaged in sales "away from the employer's place of business." The plaintiffs argued that they worked primarily from the branch office and were not regularly engaged in making sales outside of defendants' place of business. In support of their contention, the plaintiffs submitted detailed affidavits stating that they spent the overwhelming majority of their time originating loans from within the branch office and, for example, spent over ninety percent of their total work time communicating with clients and potential clients by phone, e-mail, and in writing from within the office.

The Court found that defendants' affidavit, which contained a general assertion that the plaintiffs were sometimes away from the office making sales calls and following up on leads, was insufficient evidence as a matter of law. Indeed, the Court stressed that where an employer asserts an exemption from the requirements of the FLSA as an affirmative defense, it also bears the burden of proof to show that the defense is applicable. Thus, in order to establish the exemption, the defendants were required to prove that the loan officers were "customarily and regularly" engaged in outside sales work, regularly meeting with clients and conducting business outside of the branch office. Having failed to do so, the Court held that the loan officers were therefore not exempt under the FLSA.

Having lost on the merits, the employers were then further devastated by the fact that they had no records of the hours worked by the former employees. In opposition to the employees' summary judgment motion, the employers argued that at least there was a genuine issue of material fact on the question of whether plaintiffs performed work for which they were not properly compensated. The Court found, however, that plaintiffs' affidavits pro-

vided evidence from which the Court could reasonably infer that the former employees worked 45 to 54 hours a week. If an employer fails to keep records of employees' hours under the FLSA, the employer is at fault, and an employee is not required to provide a precise accounting of the hours worked to prove a violation of the FLSA.

In addition, the Court awarded liquidated damages to plaintiffs, as is customary in cases in which the FLSA is violated. Indeed, the Court noted that in such cases the employer bears a substantial burden of persuading the court by proof that its failure to obey the statute was both in good faith (which implies some duty to investigate potential liability under the FLSA) and that the failure was predicated upon reasonable grounds. In *Schultz*, the defendants attempted to meet this burden by relying upon an opinion letter from the United States Department of Labor ("DOL"), addressed to the President of the National Association of Mortgage Brokers. That Opinion Letter had concluded that certain mortgage loan officers described by the President of the Association would qualify as exempt under the outside sales exemption. The *Schultz* Court, however, was not persuaded because the Opinion Letter was predicated on a factual proffer by the President of NAMB that the mortgage brokers at issue "perform[ed] their work primarily outside the office." Since the Court found that the *Schultz* employees had not primarily worked outside the office, and since the employers had made no attempt to investigate and/or determine the extent to which these particular plaintiffs worked inside or outside the office before classifying them as exempt, the Opinion Letter did not demonstrate that the employers had acted reasonably and in good faith, such as would justify denying an award of liquidated damages to the former employees.

As the *Schultz* opinion makes clear, the outside sales person exemption applies only where employees are spending most of their time in outside sales, meeting face to face with potential customers to solicit and sell products and/or services. Thus, employers (and their counsel) must closely evaluate the nature of the business and the duties actually performed by sales staff before classifying any sales employee as exempt under the outside sales exemption. Moreover, despite the inherent difficulty in tracking the hours of employees who make sales calls or who may work from home, the result in *Schultz* highlights the importance of maintaining accurate records of hours worked, as they can be especially important to limit a potential award of damages for unpaid wages.

The Exemption For Retail and Service Establishments

Federal FLSA regulations also create a second exemption from overtime for commission-paid salespersons under a special exemption for sales employees of "retail or service

establishments." This is an exemption only from overtime; it is not an exemption from minimum wage. To the contrary, as outlined below, in order to utilize this exemption, sales employees must be paid an hourly rate of pay that is *greater* than the applicable minimum wage, a classification that can nonetheless be important to employers because the employees who fit within this exemption need not be paid overtime for hours worked over 40 in a given workweek.

In addition, the nature of the analysis that is required under this exemption means that employers must evaluate each employee to determine whether he or she is eligible for the exemption; depending on each employee's relative success in generating commissions, one salesperson might be exempt from overtime under the retail and service establishment while another salesperson, doing exactly the same job for the same employer, is not.

A sales employee will qualify under the exemption only if (1) the employee works in a retail or service establishment; and (2) the employee receives a regular rate of pay that is in excess of one and one-half times the applicable minimum wage; and (3) more than half of the employee's compensation represents commissions on goods or services. The first prong of this three-part test is straightforward. "Retail and service establishments" are defined as establishments that are recognized in the industry as retail or service businesses engaged in the business of making the sales of goods or services, and whose annual dollar volume of sales of goods or services (or of both) includes no more than 25% of sales made for resale purposes. 29 C.F.R. § 779.313; 29 C.F.R. § 779.24. The remaining two prongs of this test can create an accounting nightmare for employers, both in terms of determining whether a particular employee fits within the exemption and in terms of ensuring that an employee is paid properly as his or her commissions and hours of work fluctuate.

To determine whether a sales employee is being paid "more than one and one-half times the applicable minimum wage," the employer may determine the employee's total earnings (whether in commissions, base salary, advances, or some combination) that are attributable to a given pay period and then divide that total compensation by the employee's total hours worked during the pay period.¹ If the result is greater than 1.5 times the minimum wage for every hour worked (including any hours over 40), this portion of the exemption has been met. Given the fluctuations in the amounts earned by commissioned salespeople, however, it can be difficult to ensure that this will be satisfied each and every pay period. For this reason, and to help salespeople deal with wild fluctuations in income, employers may institute a compensation program that includes regular advances of commissions to guarantee a basic level of income. Under this kind of program,

and to ensure that commissioned sales employees are properly paid for each hour worked, employers may advance commission payments, subject to a requirement that the employees ultimately repay the money that was advanced over a specified period of time as commissions are earned. (This reference to repayment of the advances from commissions does not suggest that an employer may recover the amounts paid if earned commissions are insufficient to cover the advance.) This practice, which typically involves advances, reconciliations, carrying forward of deficits and credits, etc. must be performed in accordance with specific, and very complex, wage regulations that are too complicated and fact specific to explain detail here. The applicable regulations also require that an employer must obtain written employee authorization from each employee with regard to wage reconciliations and deductions.

Finally, to qualify for the retail and service establishment exemption for salespeople, the employer must determine whether more than 50% of an employee's wages are commissions for sale of goods or services. If the employee is paid entirely by commissions, or through a combination of draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner (for example, if the employee gets paid a base salary, plus commissions), the employer must select a "representative period" and then determine the employee's commissions and other compensation paid during a representative period. The regulations provide employers with limited discretion in determining the "representative period" for evaluating whether a sufficient proportion of wages were earned as commissions; according to the regulations, the period may be as short as one month, but must not be greater than one year. The employer then must calculate whether more than 50% of a particular employee's compensation was paid as commissions. If so, he or she may be deemed exempt from overtime under the retail or service establishment exemption.

Advising Employers and Employees

The improper classification of employees under the wage and hour laws can be quite costly for all involved. Yet, employers often misunderstand and misapply these laws to their sales employees who are paid commissions. Careful attention to the applicable regulations, and cases interpreting such laws, is a must. The importance of regular wage and hour audits for employers in sales related industries also cannot be underestimated. All too often, these employers fail to pay their employees in accordance with the law and it is only a matter of time until they are faced with a complaint, or multiple complaints, for unpaid wages, liquidated damages, as well as attorneys' fees and costs. Wise counsel from their attorneys is necessary to help them understand and apply

the law so as to avoid litigation with their employees and attention from the Department of Labor.

Footnotes

¹ It also can be complicated to determine precisely when a commission that is paid for worked performed over an extended time period is "earned" for purposes of the FLSA.

No-Match Letter Final Rule: A No-Go Says Court

By: Matthew Green

A federal judge in California recently blocked the Department of Homeland Security ("DHS") from implementing the final rule regarding the much hyped no-match letter. DHS had intended its regulation pertaining to no-match letters to take effect on September 14, 2007. The regulation sets forth the legal obligations of employers when they receive so-called "no-match" letters from the government and describes safe-harbor procedures that an employer may follow in response to receiving such a letter. The injunction imposes a nationwide ban on the regulation.

No-match letters refer to letters employers receive when the Social Security Administration ("SSA") discovers that its social security records do not match employer records on a particular employee. Each year, employers send millions of employee W-2 forms to SSA containing employee information. Based on that information, the agency may discover that the employee's name and social security number fail to match SSA records. Since 1994, the SAA has attempted to correct such discrepancies by sending what has become commonly known as a "no-match" letter to the employer informing it of the mismatch and requesting that it correct the information. The U.S. Immigration and Customs Enforcement sends a similar letter or "Notice of Suspect Documents" if it discovers that an employee's employment eligibility verification form (Form "I-9") does not comport with agency records. The final regulation sets forth an employer's obligations and options for avoiding liability after receiving letters from either the SSA or DHS.

Immigration Concerns: the Heart of the New Rule.

In 1986, Congress passed the Immigration Reform and Contract Act ("IRCA"). Among other things, IRCA imposes penalties on employers who knowingly hire unauthorized aliens, it also imposes penalties for continuing to employ aliens if they become unauthorized after being hired.

Under current rules, an employer can satisfy its obligations not to knowingly hire unauthorized workers by obtaining specified docu-

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ments from workers. If the information the worker provides and government records fail to match, the employee is ineligible to have his or her earnings credited for Social Security benefits. The government, however, takes no action against the employer. The new regulation changes that.

In 2006, the Department of Homeland Security (“DHS”) proposed to amend regulations to define the term “knowingly” to include circumstances where an employer receives a no-match letter. In such situations, an employer may be considered to have “constructive knowledge” of the employee’s unauthorized alien status. In an effort to provide some employer protection, however, DHS also proposed safe harbor procedures that, if followed, would prevent DHS from finding the employer had constructive knowledge of an employee’s unauthorized status.

The plaintiffs in the California action, which included a consortium of unions and numerous business groups, challenged implementation of the rule, arguing it unfairly puts the attempt to resolve the country’s divisive immigration issues on the backs of employers. According to opponents, the rule would force employers to establish costly new systems to verify workers’ immigration status and give employers an impossibly short time in which to do so.

Safe Harbor: What Must an Employee Do Under the New Rule, If Applied?

The final DHS rule provides that, depending on the totality of the circumstances, an employer may be deemed to have constructive knowledge that an employee is an unauthorized alien where, among other things, the employer receives a no-match letter from SSA or notice from DHS that the information provided to the government does not comport with agency records. Pursuant to the rule, DHS would nevertheless be precluded from using the no-match letters as evidence of constructive knowledge if an employer follows the steps outlined below after receiving notice of the mismatch:

- ♦ If the employer contacts DHS and attempts to resolve the mismatch within 30 days, by, among other things, checking its own records to ensure the mismatch is not the result of employer error;
- ♦ If the mismatch is not due to employer errors, the employer must request that the employee confirm the accuracy of the information he or she provided to the employer; if the employee confirms the information is correct, the employer must advise the employee to resolve the discrepancy with the DHS within 90 days of the date the employer received the no-match letter;

- ♦ If the employer is unable to resolve the matter within 90 days, it must complete a new Form I-9 for the employee. The new form must be completed within 93 days of the date the employer received the no-match letter. The employer is precluded from accepting the documents that contain a disputed social security number or alien number referenced in the no-match letter. The employee must also present a document that contains a photograph in order to establish his or her identity or to establish both identity and employment authorization.

Employers that are unable to verify their employees’ work eligibility through completion of the new Form I-9 must decide whether to terminate the employee. The government contends that employers should not fire employees until the aforementioned process is complete unless during that time the employer obtains actual knowledge of the employee’s unauthorized status. DHS advises, however, that if the Form I-9 process is unsuccessful, or if the employee refuses to participate in the verification process, an employer that continues to employ such an employee risks being deemed to have constructive knowledge of the employee’s unauthorized status in a subsequent DHS enforcement action.

Enjoining Implementation of the Rule

In granting the injunction barring implementation of DHS’ rule, Judge Breyer of the U.S. District Court for the Northern District of California found that the balance of harms tipped sharply in favor of the plaintiffs and that the plaintiffs had raised “serious questions going to the merits.”

In a 22-page opinion, the court found that the plaintiffs had successfully established that the balance of hardships tipped in their favor. Calling the effect of the safe-harbor rule “severe,” the court noted that if it were to take effect, DHS and SSA would immediately mail no-match “packets” to approximately 140,000 employers, pertaining to approximately of 8 million workers. Previously, employers could resolve no-match issues at their leisure. Under the new rule, the court found that employers would have to establish costly human resources systems that would permit them to resolve no-match issues within the relatively short timeframe set forth in the rule.

The court also agreed with union arguments that, if implemented, the new regulation would irreparably harm employees. According to the unions, numerous employees who are legally authorized to work would be unable to resolve mismatch issues within the prescribed timeframe. Further, according to the court, because empirical research suggests that mass layoffs typically follow receipt of no-match letters, “there is a strong likelihood that employers may simply fire employees who are unable to resolve

[discrepancies] within 90 days, even if the employees are actually authorized to work.”

The court also found that the plaintiffs had raised serious questions about the legitimacy of the new rule with at least some of their arguments on the merits of their claims. For instance, the court noted that when a government agency adopts a rule that changes the agency’s prior position on a given policy, it must set forth a reasoned analysis for the change. Historically, no-match letters did not by themselves put employers on notice that an employee is unauthorized to work. The new regulation, of course, alters that position. The agency, however, failed to offer a reasoned basis for its abrupt change in policy. DHS, according to the court, may have authority to change its position, but, because it did so without a reasoned analysis, the plaintiffs raised serious questions as to whether the agency properly ignored its precedent in violation of the Administrative Procedures Act.

The court also found merit with the plaintiff’s argument that DHS exceeded its authority by interpreting the IRCA’s antidiscrimination provisions. In enacting IRCA, Congress prohibited employers from discriminating against any person with regard to the individual’s national origin or, in some instances, based on the person’s citizenship status. DHS planned to alert employers, among other things, that if they followed the rule’s safe harbor provisions, they would not be subject to suit under IRCA’s anti-discrimination provisions. The problem with that pronouncement, the court found, is that Congress delegated to the Department of Justice, not DHS, the responsibility of enforcing IRCA’s anti-discrimination provisions. DHS, therefore, may have exceeded its authority by interpreting IRCA’s anti-discrimination provisions to preclude enforcement if an employer complies with the safe-harbor provisions.

Finally, the Court found that the plaintiffs had raised serious questions regarding whether promulgation of the final rule violated the Regulatory Flexibility Act (“RFA”). RFA requires agencies to prepare a “regulatory flexibility analysis,” which among other things, determines the “steps the agency has taken to minimize the significant economic impact on small entities.” The RFA allows for an exception if the agency certifies that the rule will not significantly impact a significant number of small entities. DHS originally made such a certification. The court, however, questioned the veracity of that claim considering the plaintiffs’ declarations that small businesses would incur substantial costs to comply with the new rule within the 90-day timeframe.

The court’s ruling blocks implementation of the final rule indefinitely until the court issues a final decision in the case or unless and until the district court’s Order is reversed on appeal before the United States Court of Appeals for the Ninth Circuit. As of early December, the district court had not yet set a trial date.

Maryland Employers Confronted with Additional Liability as a Result of the Newly Enacted Anit-Discrimination Measure

By: Carla Murphy, Neil Duke and Stacy Bekman Radz

Earlier this year, without a great deal of public attention, the General Assembly passed Senate Bill 678/House Bill 314, commonly referred to as the Civil Rights Preservation Act of 2006. In April 2007, the Bill was signed by Governor Martin O’Malley. Despite the lack of public awareness, the new law drastically altered the playing field for litigating employment discrimination cases in the State of Maryland by creating a private cause of action under Article 49B in state court.

To gain a real appreciation of the impact that this change will have on Maryland employers, a basic understanding of the relevant statute in its prior form is necessary. Maryland Article 49B prohibits discrimination in employment. Like Title VII and other federal anti-discrimination statutes, Article 49B precludes discrimination on the basis of race, color, religion, sex, age, national origin and physical or mental handicap. Unlike Title VII and its related federal statutes, Article 49B also prohibits discrimination on the basis of familial status, marital status, sexual orientation, and genetic testing.

Prior to the amendment of Article 49B, enforcement of the state law prohibiting discrimination was limited. The Maryland Commission on Human Relations (“MCHR”) was empowered to receive charges of investigation and then attempt to resolve the claim through conciliation, and/or to refer the claim to a hearing examiner if circumstances warranted such an outcome. State law did not extend any rights to private individuals. Thus, in the past, a complainant’s only relief under Article 49B was to file an administrative complaint with the MCHR and then rely upon that agency’s investigation. At the conclusion of the MCHR’s administrative investigation, an employee was free to file suit in federal court under Title VII (if the employee also had filed his or her charge of discrimination with the EEOC), but the employee could not file suit in state court under Article 49B.

The Civil Rights Preservation Act of 2006, which took effect on October 1, 2007, changed that. For the first time, if the MCHR believes that a charge of discrimination is meritorious, it may elect to file a cause of action in the circuit courts based on the employee’s charge of discrimination or to take an employee’s claim to an administrative judge, who is authorized to award reinstatement, back pay, compensatory damages and/or other appropriate relief to aggrieved employees. Even more significantly, under the newly amended Article 49B, an employee now has the right to

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bring a private cause of action against his or her employer in state court, in the county where the alleged act of discrimination took place, after waiting 180 days from the filing of an administrative charge. An aggrieved employee may sue his or her employer in state court on state law claims seeking lost wages, compensatory damages, attorneys' fees, punitive damages and costs. As is true under Title VII, non-economic compensatory damages will be capped depending on the size of the employer. For instance, the maximum compensatory damages award that can be levied against an employer with 15 to 100 employees will be \$50,000.00. An employer with more than 500 employees could be confronted with compensatory damages of \$300,000.00.

In addition, an employer's exposure under Article 49B is broader than it is under Title VII because state law also prohibits discrimination on the basis of familial status, marital status, sexual orientation, genetic information and testing, as well as allowing age discrimination suits by people younger than 40.

Although the ultimate impact is still unclear, this new law and the remedies it provides will be unsettling for many employers (and their lawyers) who must navigate this new terrain. There is considerable concern among many that the new law will result in a dramatic increase in the number of discrimination claims against employers. There is also considerable concern among defense lawyers that their clients will be less able to obtain early dismissal of meritless claims, either through a motion to dismiss or on summary judgment, because the federal courts generally are perceived as being more likely to grant dispositive motions than their state counterparts. The rules of procedure and evidence in state court additionally may prove to be more favorable to a plaintiff employee because they often provide more latitude for claimants than the Federal Rules of Civil Procedure.

Exacerbating this concern is the fact that there is virtually no binding precedent at the outset of this new law to govern the myriad of issues that typically are presented in employment discrimination cases. The fact that historically there has been no private cause of action under Article 49B means that there are no authorities interpreting the rights granted by that statute, although there is some limited authority interpreting the several Maryland county ordinances outlawing discrimination in employment that might be used to predict how the state courts would interpret Article 49B. Of course, Maryland's state court judges might well decide to rely on the federal authorities interpreting Title VII but they will not be compelled to do so, nor will they be compelled to follow the precedent of the Court of Appeals for the Fourth Circuit. It likely will be at least a decade before the Court of Appeals of Maryland resolves many of the important legal issues in discrimination claims like the relative burden of proof, presumptions, pretext, what constitutes a disability, and so on.

As a preview of what might occur, however, a recent decision by the Court of Appeals of Maryland rejected settled precedent from the United States Supreme Court and, instead, aligned itself with a minority of jurisdictions, when the Court of Appeals held that the start of the limitations period for discrimination claims begins to run when an adverse job action is implemented rather than when the employee received notice of the adverse job action. *Cf. Haas v. Lockheed Martin Corp.*, 396 Md. 469, 914 A.2d 735 (2007) (statute of limitation under a county ordinance outlawing disability discrimination begins to run when the adverse job action is implemented against the employee); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007) (statute of limitations under Title VII begins to run when the adverse job action is announced to the employee). In a prelude of how the Court of Appeals might be more favorably predisposed to an employee's claim than the federal courts, in reaching its decision, the *Haas* Court stated that its ruling was necessary to prevent "sharp" employers from providing "exceptionally long" notice periods prior to termination in an effort to deter employees from filing suit.

Limiting Exposure

In light of the new private cause of action under Article 49B, a number of practical steps can be taken by employers to minimize the risks. The amendment presents another opportunity to encourage employers to adapt, revise, and enforce company-wide anti-discrimination and non-harassment policies. Among other things, supervisors and management personnel should receive training on an ongoing basis to detect and prevent discrimination and harassment. Employers also should require exit interviews any time an employee's employment is terminated. These exit interviews may help to defuse complaints, allow the employer an opportunity to offer to remediate any legitimate problem identified and, more importantly, to hear of the basis of any possible legal claims prior to the employee's departure. An employee who participates in an exit interview and who fails to register a complaint about any alleged discrimination may find it more difficult later to pursue a discrimination claim with the administrative agency and in court.

The changes in Maryland's anti-discrimination law also make it appropriate for employers to consider requiring employees to enter into mediation agreements, arbitration agreements, or to sign waiver of jury trial agreements. Even the best-behaved employers are aware that discrimination and harassment lawsuits can expose them to unpredictable juries and jury verdicts, particularly in state court. Obviously, one way to avoid a jury trial is to require employees to agree to binding arbitration. However, employers that do not want to commit themselves to binding arbitration may want to consider requiring employees sign an agreement waiving their right to a trial by

jury, which might avoid the risk associated with a jury trial, while preserving for both the employer and the employee the formality of the judicial process and the right to appeal an adverse ruling.

Although there is no Maryland authority on jury trial waivers in the employment context, the logic of earlier Court of Appeals decisions upholding an employee's waiver of the right to a jury trial in favor of binding arbitration would tend to support a more limited waiver of the right to a jury trial in favor of a bench trial. As is also true with arbitration provisions, consideration to support an employees' waiver of a jury trial must be provided if a waiver is to be enforceable. That consideration preferably would be provided if the waiver is required at the time an offer of employment is extended or when a promotion or other significant employment benefit is granted; although somewhat more controversial and perhaps open to challenge, employers also may establish consideration to support a jury trial waiver by at-will employees through reciprocal promises to commit disputes to binding arbitration. See *Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, 378 Md. 139, 835 A.2d 656 (2003) (mutual promise by employer and employee to commit to binding arbitration would provide consideration to support employee's waiver but finding employer's unilateral right to withdraw arbitration agreement made consideration illusory); *Holloman v. Circuit City Stores, Inc.*, 391 Md. 580, 894 A.2d 547 (2006) (mutual promise by employer and employee to arbitrate dispute was supported by consideration even though arbitration clause allowed employer to repudiate arbitration agreement upon 30 days' notice).

There is a clear financial benefit to employers who are able to avoid jury trials of employment related disputes. A 2001 Civil Justice Survey of State Courts done by the United States Department of Justice determined that in 2001 prevailing employees in employment discrimination cases, on average, received a jury award of \$218,000, whereas they only received \$40,000 from judges. For that reason alone, plaintiffs' counsel and defense counsel are likely to continue to struggle over the appropriate vehicle for resolution of employment disputes.



Panel of the Court of Special Appeals of Maryland Declares Accrued But Unused Vacation Must Be Paid Out At Termination of Employment and the Maryland Division of Labor and Industry Now Agrees

By: Sharon Snyder and Stacy Bekman Radz

On August 20, 2007, a panel of the Court of Special Appeals ruled that employees must be paid for accrued but unused vacation pay at the time of termination of employment. *Catapult Tech. Ltd v. Wolfe* (Md. Ct. Spec. App. 2007). This opinion, which contradicted two earlier cases interpreting the Maryland wage payment statute (one of which had been reversed on other grounds), was entirely unexpected to many employment law practitioners in Maryland. The decision also was contrary to the long-standing interpretation of the Maryland wage payment statute by the Maryland Division of Labor and Industry, which had a statement on its web site essentially stating that an employee was not entitled to be paid for accrued but unused vacation if the employee was advised in advance that such leave would not be compensable upon termination.

Whether by coincidence of timing or otherwise, that interpretation apparently was eliminated by the DLI from its web site at around the time of the *Catapult Tech.* hearing, and the DLI web site had no statement taking a position either way as to whether accrued vacation leave was compensable at the time of termination. Then, in a one-two punch, a three-judge panel of the Court of Special Appeals in *Catapult* rejected the commonly held belief that a company did not have to pay for accrued but unused vacation, and the Maryland Division of Labor and Industry altered its website to require such payment. The DLI's web site now provides the following question and answer to address the issue:

Q: Wages and Compensation - Unused Vacation at Termination — Is It Payable?

A: When an employee has earned or accrued his or her leave in exchange for work, an employee has a right to be compensated for unused leave upon the termination of his or her employment regardless of the employer's policy or language in the employee handbook.

<http://www.dlir.state.md.us/labor/wagepay/wpunusedvacpay.htm>

If these two authorities prevail, accrued vacation time is an earned "wage" under Maryland Wage Payment and Collection Law ("MWPCCL") for services performed. Thus, just as earned wages

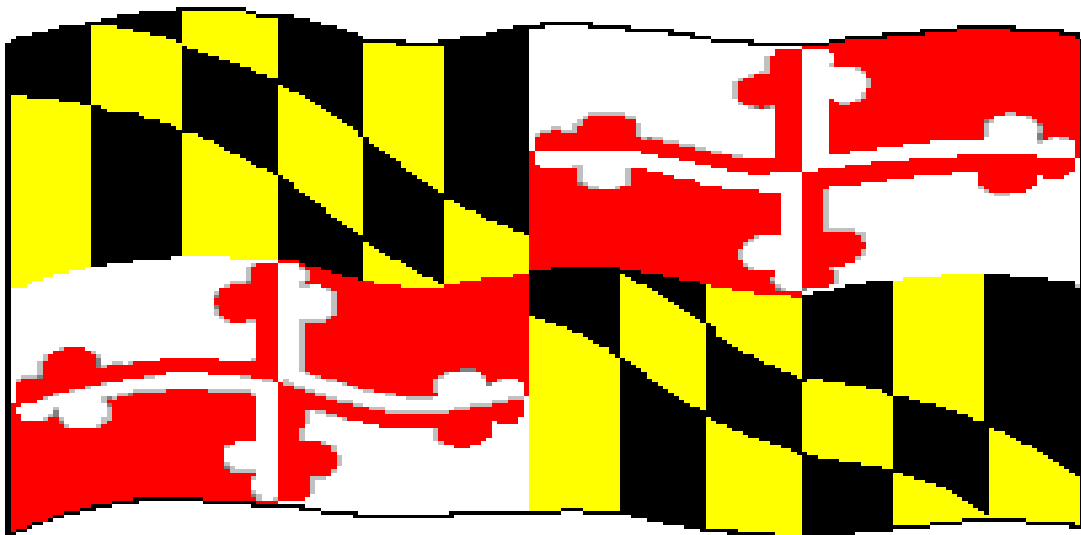
cannot be forfeited, accrued vacation time can not be forfeited at the time of termination. Moreover, to the extent that accrued vacation is considered a “wage” under the MWPCL, an employer who fails to pay for accrued but unused vacation can be held liable for treble damages and recovery of attorney’s fees unless there is a *bona fide* dispute over whether the money was owed (a position which becomes more difficult to establish in light of the DLI web site and the *Catapult* decision, which was not appealed). See Md. Code Ann., Lab. & Emp. § 3-507.1.

The *Catapult Technology* Case

The defendant employer, Catapult Technology, Ltd., was a government contractor that provided business and technology services to the federal government. The plaintiffs were fourteen former employees of Catapult who had worked on a contract to provide network services to the United States Department of Transportation (the “DOT”) for three years. Unfortunately for Catapult, the DOT decided not to renew its contract with Catapult and the department instead awarded the new contract to Bowhead Information Technology Solutions (“Bowhead”). Catapult informed its employees that it intended to appeal the DOT decision and that it was confident that it would prevail on its appeal. The company also reminded the employees that the employee handbook required any employee who quit to provide two weeks’ notice and that the employees remained subject to the non-compete provisions in their employment contracts.

The day after the contract expired, the displaced employees reported for work only to find that there were not enough jobs available for all of the employees. They were, however, advised by the company that it was working to identify positions for them within the company and that they should return to work on Monday. Instead, the employees met with Bowhead and were offered positions with that company. The employees gave their resignations to Catapult to be effective immediately, and they accepted employment with Bowhead. In response, Catapult refused to pay the employees for any accrued vacation time because Catapult had a policy, detailed in its employment manual, which stated that employees would lose any accrued vacation and sick leave (“universal leave”) if they failed to give two weeks’ notice in writing of their resignation.

The employees filed suit in the Circuit Court of Montgomery County for payment of their accrued but unused leave, and the trial court sided with the employees, granting their motion for partial summary judgment and holding that Catapult had violated the MWPCL. The case went forward as a jury trial on the issue of whether the parties had a *bona fide* dispute regarding Catapult’s entitlement to withhold the employees’ accrued leave. If no *bona fide* dispute existed, then the employees were entitled to treble damages under § 3-507.1. The jury ruled in favor of the employees and awarded treble damages. Catapult appealed the Circuit Court’s ruling and raised two issues on appeal: (1) whether the Circuit Court erred in ruling that Catapult’s leave policy violated



the MWPCCL; and (2) whether there was sufficient evidence to substantiate a jury verdict that no *bona fide* dispute existed between the parties in connection with Catapult's refusal to pay for accrued but unused leave.

On appeal, the Court of Special Appeals concurred with the Circuit Court on the issue of whether Catapult's leave policy violated Maryland law. The Court declared that universal leave is a "wage" under the MWPCCL and must be paid upon termination of the employee's relationship. Specifically, the Court stated universal leave is given "in remuneration' for the employee's work and therefore constitutes a wage under the WPCL." *Id* at 12.

In reaching this conclusion, the *Catapult* Court found that the case was analogous to *Medex v. McCabe*, 372 Md. 28 (2002), which addressed an employer's obligation to make incentive payments to employees after their termination. In *Medex*, the employer had a policy in its employee handbook in which it promised to provide certain incentive payments if employees met their targets and if the participant was still "an employee at the end of the incentive plan (generally the fiscal year) and [was] employed at the time of actual payment." After the plaintiff quit his position, Medex refused to make the incentive payment when it otherwise would have become due on the grounds that the employee had resigned and therefore was ineligible under the written terms of the incentive plan. The Court of Appeals ruled that the incentive payments were commissions and thus "wages" under the MWPCCL. In reaching that conclusion, the court stated that "[i]n accordance with the policy underlying the Maryland Act, an employee's right to compensation vests when the employee does everything required to earn wages. . . . A contract that necessitates the deprivation of some portion of the fees worked for by the employee contravenes the purpose of the Act." *Id.* at 41.

The Court in *Catapult* reasoned that the logic of the *Medex* case also would apply to compel the payout of accrued but unused vacation upon termination. Reasoning that an employee's right to vacation is earned as a consequence of an employee providing services to an employer, the Court concluded that such leave – if not taken as leave by the employee – must be compensated at the time of termination of employment. The Court also ruled that Catapult's forfeiture provision, in its universal leave policy, was contrary to Maryland law, invalid

and against public policy. However, the Court also reversed the award of treble damages against the employer and held that, under these particular circumstances, there was a *bona fide* dispute between the parties and that the employees therefore were not entitled to treble damages.

The Issues Are Not Entirely Resolved

The *Catapult* case is an unreported decision by a three judge panel of the Court of Special Appeals. Thus, technically, the decision is not final, binding precedent and another court could disagree. At the same time, lower courts often follow the decisions of the Court of Special Appeals until they are reversed by the Court of Appeals. The risk created by employers ignoring this decision is compounded by the amendment of the Division of Labor and Industry's web site advising employers that they should pay employees for accrued but unused leave.

In addition, the logic of the *Catapult* opinion could put at risk any "use it or lose it" vacation policy. Many employers limit the amount of vacation that an employee may carry over to another year, specifically advising employees that they will lose any vacation they do not use in a given year. Under the *Catapult* reasoning, those employees arguably should be required to use any accrued leave before the end of the year or be paid for vacation time that they cannot use and cannot carry over to the next year.

Finally, the *Catapult* Court alluded to the possibility that sick leave might be treated differently from other kinds of leave, but did not directly resolve that issue since the employer in that case had a "universal leave" policy which provided leave that could be used as either sick or vacation leave. There is good reason to conclude that accrued sick leave – provided for the sole purpose of providing compensation in the event of illness or disability – would not be paid upon termination since the event necessary to give rise to the leave (illness or disability) never occurred. That conclusion, however, is not certain.

Employment attorneys can only hope that the Court of Appeals soon agrees to hear a case in which it can decide whether the Court of Special Appeals correctly interpreted Maryland wage and hour law in the *Catapult* opinion, as well as to address the other issues that are raised by that case.



Required Use of Revised I-9 Forms: What Employers Must Be Told

By: Neil Duke

On November 7, 2007, the United States Citizenship and Immigration Services (USCIS) announced the availability of a revised I-9 Form, which employers must now begin to use. The I-9 Form is the standard document used by all U.S. employers to verify an individual's eligibility for employment through the review of specified documents.

The biggest change to the I-9 Form is that it does away with outdated references to the Immigration and Naturalization Service (INS), which was replaced by the USCIS. Additionally, the new I-9 Form eliminated the following five documents that were previously featured on the form's "List A" of the List of Acceptable Documents:¹

- ◆ Certificate of U.S. Citizenship (Form N-560 or N-561);
- ◆ Certificate of Naturalization (Form N-550 or N-570);
- ◆ Alien Registration Receipt Card (I-151);
- ◆ Unexpired Reentry Permit (Form I-327); and
- ◆ Unexpired Refugee Travel Document (Form I-571).

Now employers may accept only the following documents under List A to establish both identity and employment eligibility:

- ◆ An unexpired or expired U.S. Passport;
- ◆ A permanent resident card or alien registration receipt card (Form I-551);
- ◆ An unexpired foreign passport with a temporary I-551 stamp;
- ◆ An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's non-immigrant status, if that status authorizes the alien to work for the employer; and
- ◆ A Form I-766 (Unexpired Employment Authorization Document).

The only other noteworthy revision to the I-9 Form (which may now be retained electronically by employers), is that employees are no longer obligated to provide their social security numbers in Section 1 of the I-9 Form unless their employer participates in the USCIS Electronic Employment Eligibility Verification Program (E-Verify).

Unquestionably, the issue of immigration control and reform is a high-profile topic that is the subject of heated national debate. Employers should be advised of the possibility of increased gov-

ernmental audits related to I-9 compliance and the reality that inaccurately completed I-9 Forms (or failure to preserve such forms for the requisite period of time), could result in substantial fines and penalties.

Footnotes

¹ List A documents establish both identity and employment eligibility. In contrast, List B documents establish only identity and List C documents establish on employment eligibility.



NLRB - Employees Have No Statutory Right to use Employer's Email for "Section 7 Communications"

THE GUARD PUBLISHING COMPANY, D/B/A THE REGISTER GUARD
351 NLRB No. 70 (DECEMBER 16, 2007)
<http://www.lawmemo.com/nlr/vol/351/70.htm>

The National Labor Relations Board, in a 3-2 decision, held that an employer did not violate Section 8(a)(1) by maintaining a policy that prohibited employees from using the employer's e-mail system for any "non-job-related solicitations."

The Board majority also announced and applied a new standard for determining whether an employer has violated Section 8(a)(1) by discriminatorily enforcing its policies. In deciding the case, the Board considered the exceptions and briefs of the parties, amicus submissions from various organizations, and presentations by the parties and some amici at an oral argument on March 27, 2007.

The employer's written policy prohibited the use of e-mail for "non-job-related solicitations." In practice, the employer allowed a number of nonwork-related employee e-mails, but there was no evidence that it permitted e-mails urging support for groups or organizations.

The employer issued two written warnings to employee Suzi Prozanski for sending three union-related e-mails. The complaint alleged that the employer's maintenance of the policy and its enforcement against Prozanski were unlawful.

Addressing the maintenance of the policy, the Board majority of Chairman Battista and Members Schaumber and Kirsanow reasoned that under Board precedent, employees have no statutory right to use an employer's equipment for Section 7 purposes. The majority found that Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), in which the Court held that a ban on solicitation during nonworking time was unlawful absent special circumstances, was inapplicable to the use of an employer's e-mail system, because Republic Aviation involved only face-to-face solicitation, not the use of employer equipment. The majority noted that the use of e-mail "has not changed the pattern of industrial life at the Respondent's facility to the extent that the forms of workplace communication sanctioned in Republic Aviation have been rendered useless. . . . Consequently, we find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications." Therefore,

the majority concluded, the maintenance of the policy did not violate Section 8(a)(1).

With respect to the alleged discriminatory application of the policy to Prozanski's e-mails, the majority clarified that "discrimination under the Act means drawing a distinction along Section 7 lines." The majority adopted the reasoning of the United States Court of Appeals for the Seventh Circuit, noting that in two cases involving the use of employer bulletin boards, the court had distinguished between personal nonwork-related postings such as for-sale notices and wedding announcements, on the one hand, and "group" or "organizational" postings such as union materials on the other. See Fleming Companies v. NLRB, 349 F.3d 968, 975 (7th Cir. 2003), denying enf. to 336 NLRB 192 (2001); and Guardian Industries Corp. v. NLRB, 49 F.3d 317, 319-320 (7th Cir. 1995), denying enf. to 313 NLRB 1275 (1994). The Board majority found that the court's analysis, "rather than existing Board precedent, better reflects the principle that discrimination means the unequal treatment of equals." The majority overruled the Board's decisions in Fleming, Guardian, and other similar cases to the extent they were inconsistent with its decision here.

Applying its new standard, the majority found that the employer had permitted a variety of personal, nonwork-related e-mails, but had never permitted e-mails to solicit support for a group or organization.

Because two of Prozanski's e-mails were solicitations to support the union, the employer did not discriminate along Section 7 lines by applying its e-mail policy to those e-mails. However, the majority found that a third e-mail by Prozanski was not a solicitation, but simply a clarification of facts surrounding a recent union event. Accordingly, the enforcement of the policy with respect to that e-mail was unlawful.

In dissent, Members Liebman and Walsh argued that "given the unique characteristics of e-mail and the way it has transformed modern communication, it is simply absurd to find an e-mail system analogous to a telephone, a television set, a bulletin board, or a slip of scrap paper." Therefore, the dissenters reasoned, Board decisions finding no Section 7 right to use such employer property are inapplicable. Rather, pursuant to Republic Aviation, supra, and Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978), the Board's task in cases involving employee-to-employee communication in the workplace "is to balance the employees' Section 7 right to communicate with one another against the employer's right to protect its business interests." In the dissenters' view, where an employer has given employees access to e-mail in the workplace for their regular and routine use - as the employer has done - a ban on "non-job-related solicitations" should be unlawful absent a

showing of special circumstances. Finding no proof of special circumstances here, the dissenters would have found that the maintenance of the policy violated Section 8(a)(1).

Regarding the alleged discriminatory enforcement of the policy, Members Liebman and Walsh stated that they would adhere to Board precedent, under which they would find a violation as to all three of Prozanski's e-mails. They contended that the "discrimination" analysis applied by the Seventh Circuit and adopted by the majority, which focused on whether the other activities permitted by the employer were "equal" to Section 7 activity, was not appropriate in Section 8(a)(1) cases. In the dissenters' view, the essence of a discriminatory enforcement violation is interference with the employees' Section 7 rights, and "[d]iscrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer's business justification" for prohibiting the activity.

In addition to the issues relating to maintenance and enforcement of the employer's existing e-mail policy, the Board majority of Chairman Battista and Members Schaumber and Kirsanow also dismissed an allegation that the employer violated Section 8(a)(5) and (1) of the Act by insisting on a bargaining proposal that

would prohibit use of the e-mail system for "union business." Without passing on whether the proposal was unlawful, the majority found insufficient evidence that the employer had "insisted" on the proposal. In dissent, Members Liebman and Walsh found that the evidence as a whole did show "insistence," and that the proposal was an illegal codification of a discriminatory practice of allowing e-mail use for a broad range of nonwork-related messages, but not for union-related messages.

The Board also unanimously affirmed the judge's finding that the employer violated Section 8(a)(1) by maintaining an overly broad rule, in the absence of special circumstances, prohibiting employees from wearing or displaying union insignia while working with the public.



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