MARYLAND EMPLOYMENT LAW REPORTER

A Monthly Legal Newsletter Aimed at Maryland's Labor and Employment Law Professionals

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MONTGOMERY COUNTY VOLUNTEER FIREFIGHTERS ALLOWED TO RECOVER ATTORNEY'S FEES IN PERSONNEL ACTIONS

Volunteer firefighters in Montgomery County can recover attorney's fees under a county code provision that allows county employees to recover fees in appeals of personnel actions, the **Court of Special Appeals** ruled last month.

"In sum, we conclude that the language, context, and purpose of the relevant statutory provisions entitle volunteer firefighters to attorney's fees when the County seeks judicial review of an unfavorable Board decision," **Judge Adkins** wrote. But the court did not rule on whether or not the firemen are entitled to attorneys' fees for administrative decisions as the issue was not preserved for appeal.

The case came before the appellate court after **Keith Golden** and the **Kensington Volunteer Fire Department** (KVFD) challenged a trial court's ruling that a volunteer firefighter could not recover attorney's fees under a county code provision that allows county employees to recover fees in appeals of personnel actions. Maryland's intermediate appellate court reversed that decision, holding in a reported opinion that volunteer firefighters are entitled to attorney's fees to the same extent as county employees.

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COURT REJECTS LODESTAR METHOD FOR CALCULATING ATTORNEY'S FEES IN DISCRIMINATION CASE

The lodestar approach to calculating attorney's fees is correct unless an applicable statute calls for some other means of calculation, the state's top court has ruled.

"We hold that, when attorney's fees are permitted by statute or ordinance, the lodestar approach to the calculation of reasonable attorney's fees is generally the correct approach, except in instances where other criteria for the calculation of such fees are provided, as in the present case, in the fee-shifting statute," **Judge Cathell** wrote.

The underlying case involved a claim by a woman who alleged marital status/sex discrimination against a country club that allegedly did not allow women to play its golf course. As a result of Betty Flaa's complaint to the **Montgomery County Human Relations Commission** (now called the Office of Human Rights) in 1993, **Manor Country Club** was deemed a place of public accommodation which could not treat persons differently on the basis of sex.

The administrative panel awarded attorneys' fees to be paid by the losing party but at an 89 percent reduction of the hours reportedly worked. The hourly rate was not disputed. The panel looked to Montgomery County Code §27-7 in awarding Flaa $750.00 out of a maximum of $1,000 in damages for humiliation and embarrassment and generally invoked the criteria of Montgomery County Code §27-7(k)(1) in awarding attorney's fees of $3,000.

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MONTGOMERY COUNTY VOLUNTEER FIREFIGHTERS *continued from page 1*

Internal Investigation

Golden was investigated and disciplined by KVFD after two complaints regarding his treatment of subordinate firefighters. During the second investigation, the Fire Administrator (FA) ordered an internal investigation into Golden's behavior and the sanctions imposed upon him. At the conclusion of the internal investigation, the FA imposed additional punishment upon the firefighter.

KVFD and Golden appealed the FA's decision to the **Montgomery County Fire and Rescue Commission** (Commission), arguing that the FA exceeded the scope of his authority under applicable county law in ordering the additional punishment. The Commission affirmed the FA. However, the Merit Systems Protection Board (Board) ruled in favor of Golden and the KVFD.

Montgomery County appealed that decision to the **Circuit Court for Montgomery County**. The circuit court affirmed the Board's decision in favor of KVFD and Golden and denied their petition for attorney's fees fees for proceedings before the Commission, the Board and the trial court. Golden and KVFD appealed.

Circuit Court Fees

In reviewing an administrative decision, the court's role is limited to determining if there is substantial evidence in the record to support the agency's findings and conclusions and to determine if the administrative decision is premised upon an erroneous conclusion of law. *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530 (1999).

Golden and KVFD argued that they were entitled to attorney's fees for proceedings at both the circuit court and the administrative levels. They contended that §21-7(g) and 33-15(c) of the Montgomery county Code, when read together, mandate that the county pay the reasonable attorney's fees associated with judicial review of the case. They argued that deciding otherwise was not consistent with legislative intent.

Section 27-7(g) provides that any employee of or volunteer at a local fire and rescue department or any other aggrieved person may appeal a decision of the Commission involving a specific personnel action to the Board as if aggrieved person were a county merit system employee.

Section 33-15(c) provides that when the chief administrative officer is the party seeking judicial review of a board order or decision, the county shall be responsible for the employee's legal expenses.

The county countered that the "as if" language in §21-7(g) provides volunteers only the right to appeal a Commission decision to the Board, without giving the right to attorney's fees enjoyed by employees under §33-15(c) when the county seeks judicial review.

Relying on legislative intent, the court responded that the "as if" language meant that volunteers are to be treated as though they are employees. The court pointed out that the stated purpose of Chapter 21 of the Code is to offer equal opportunities and fair treatment for all personnel. The court quoted from a 1998 memo discussing the bill that restructured Chapter 21 of the Code. The memo said that the rules apply to all elements of the fire and rescue system, including career service employees and local department volunteers.

"The County's reading of section 21-7(g) is inconsistent with the purpose and legislative history of Chapter 21, because it does not promote equal treatment of volunteers and employees," the court said.

The court also rejected the county's assertion that the circuit court had no jurisdiction to rule on the petition for fees. Generally, a circuit court reviewing an agency decision is limited to dismissing an action, remanding or reversing or modifying the agency's order or action; however, where otherwise provided by law, a circuit court's authority during judicial review may be expanded, the court said, relying on Maryland Rule 7-209. In this instance, §33-15(c) explicitly calls for the payment of attorney's fees when the county seeks review of an adverse Board decision, the court pointed out.

Administrative Fees

The Board denied Golden's and KVFD's petition for administrative fees, deciding that it could award fees only to paid employees. Golden and KVFD contended that, under the same construction of §21-7(g), volunteers are to be treated as if they are employees, entitling them to an award of administrative fees under §33-14(c). The County contended that, because they failed to appeal the Board's order denying their fee request within 30 days, the issue was not preserved for appeal. The court agreed.

Kensington Volunteer Fire Department, et al. v. Montgomery County, Maryland, Court of Special Appeals, No. 1189, Reported, July 12, Judge Adkins.

STATE'S TOP COURT REJECTS LODESTAR METHOD *continued from page 1*

The panel explained, in part, that the "total time billed was excessive given time expended in similar cases with the same level of difficulty."

Application of Attorneys' Fees

Flaa and Manor each asked the **Circuit Court for Montgomery County** to review the panel's opinion and order. In addition to questioning the decision on hostile environment, Flaa also cited several **United States Supreme Court** decisions that addressed awarding attorney's fees in civil rights litigation and that introduced the proposition that "in civil rights cases, attorneys' fees are calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate . . . commonly referred to as the 'lodestar.'"

The lodestar approach consists of a formula explained in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."

At the time Flaa bought her action, Montgomery County legislation allowed the Montgomery County Human Relations Commission to award attorney's fees upon finding that unlawful discrimination had occurred. The statute provided that the Commission could award reasonable attorney's fees if factors such as the time and labor required, the novelty and complexity of the case, the experience, reputation and ability of the attorneys and awards in similar cases was taken into account.

The trial court affirmed the decision but it vacated and remanded the decision on attorney's fees. The court labeled the panel's award a "cost-benefit analysis" and concluded that the panel made an error of law in its determination of the attorney's fee award. The court directed the panel to consider the factors in §27-7(k)(1) and to indicate to a reviewing court how those factors played a role in determining the award of attorney's fees.

In a revised Order and Opinion, the panel concluded that, based upon its lodestar analysis of all of the factors, Flaa should be awarded attorney's fees of $22,440—132 hours multiplied by counsel's average firm billing rate of $170 an hour.

Flaa asked the trial court to review the panel's revised Order, arguing that the panel had committed an error of law by failing to consider her degree of success in prevailing on her discrimination claim and that the panel had erroneously reached its award by applying a cost-benefit analysis. The judge, ruling from the bench, affirmed the panel's revised Order.

On appeal to the **Court of Special Appeals**, Flaa emphasized the panel's failure to apply the lodestar approach to the calculation of attorney's fees. In a reported opinion, the state's intermediate appellate court vacated the trial court's decision and remanded to the panel to determine the lodestar amount and, if reductions were made, provide an explanation for the disallowed hours.

Court of Appeals Arguments

Manor contended that instead of a lodestar method, Montgomery County Code §27-7(k)(1) governs the calculation of any attorney's fees that the panel could award. Manor argued that no "precise, mathematical formulaic application of the 'lodestar amount' is required since the statute itself ensures that a Panel adhering to the statute will include a determination of reasonable hours in its consideration of reasonable attorney's fees."

Flaa, on the other hand, urged the court that any award of attorney's fees under civil rights legislation should be comprised of a two-step process: First, the calculating and awarding entity—whether an administrative body or a court—must determine a lodestar, i.e., the product of a reasonable number of hours expended on the case multiplied by a reasonable hourly rate. Next, the calculating and awarding entity could adjust the lodestar-derived figure upward or downward based upon the application of adjustment factors such as those prescribed in §27-7(k)(1) or laid out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.).

Flaa also said that *Friolo v. Frankel*, 373 Md. 501 (2003) should govern the award of attorney's fees under fee-shifting statutes in Maryland and contended that her case was a particularly worthy candidate for a lodestar calculation given its civil rights nature and novelty of the issue presented.

Court Reasoning

In reversing the intermediate appellate court and remanding with instructions to affirm the trial court's decision, the state's top court said the use of the lodestar approach in this instance was unnecessary given the criteria in §27-7(K)(1). In instances where a statute creates the right to fee-shifting and contains criteria for the setting of such fees, the statutory criteria are to be invoked, the court observed.

The court rejected Flaa's interpretation of *Friolo*, explaining that it had not mandated a lodestar approach to calculating attorney's fees. Rather, it had indicated application of the lodestar method to L&E §§3-427 and 3-507.1 and indicated approval of the approach in conjunction with other fee-shifting statutes that provide for the possible award of attorney's fees but lack criteria for how to calculate such fees.

Dissenting Opinion

Chief Justice Bell wrote the dissenting opinion. The esteemed judge said that he did not doubt that the panel erred in its determination of the attorney's fees awarded and that, as the Court of Special Appeals held, the trial court erred in affirming that award. Although Flaa did not prevail on her claims of hostile environment and disparate impact, she prevailed on a matter of first impression in Maryland—her claim that the country club was a place of public accommodation and on her claim of sex discrimination. He said that, like the Court of Special Appeals, he was unable to understand the reason for an 89 percent reduction in hours in a case in which the party seeking attorney's fees prevailed on two of its four claims and one of those claims was a matter of first impression.

"It is absolutely clear to me that the panel did precisely what the Circuit Court, on initial review, surmised that it had done, engaged in and applied a cost-benefit analysis. Such an approach, because it requires the attorney's fees award to be proportional to the monetary judgment award, is inconsistent with the purpose of the ordinance, to allow, not discourage, access to the courts for meritorious, though small, in terms of actual damages, claims," he said.

Manor Country Club v. Betty Flaa, Court of Appeals, No. 111, May 18, Judge Cathell (majority opinion), Chief Justice Bell (dissenting opinion).

COURT RULES THAT LAW FIRM'S ACTIONS AGAINST FEMALE ATTORNEY VIOLATED FEDERAL LAW

A female associate at a Virginia law firm was the victim of unlawful retaliation in violation of the Title VII, the **United States Court of Appeals for the Fourth Circuit** has ruled in an unpublished opinion. In addition, the lower court erred when it refused to let the jury rule on her claim for punitive damages.

"We hold that [Dawn] Gallina presented evidence that is sufficient for a reasonable jury to find that **Mintz Levin** perceived the risk of violating federal law through its retaliation. A reasonable jury could have found that members of a prominent law firm, and especially a firm with an employment law section in the relevant office, perceived the risk of violating federal law in retaliating against an employee," the court said.

Mintz Levin is headquartered in Boston, Massachusetts and has offices located throughout the United States. Dawn Gallina worked as an associate in the Business and Finance section of Mintz Levin's office in Reston, Virginia from 1999 until her termination in 2001 for alleged poor performance.

Gallina said that **Mark Wishner**, then acting as managing partner of the Reston office, began to treat her differently when he found out that she had a small child. For example, she said that Wishner was friendlier to the male attorneys, that he used harsh language in her presence and allegedly told her that it was hard for women attorneys to balance the demands placed upon them by family and work. Gallina said that Wishner also told her a story about a female attorney who asked about making partner after returning from her maternity leave in such a way that it left Gallina with the impression that "pregnant women don't make partner."

While on a trip to the firm's Boston office, Gallina complained about the treatment she was receiving to the firm's Business and Finance administrator. The administrator referred the complaint to a firm partner. Gallina said the partner asked her not to file a formal complaint because the matter could be dealt with informally. However, after Gallina was told that she had "embarrassed" the Reston office by airing "dirty laundry," she complained to the firm's Director of Human Resources for the Boston office.

Gallina took her case to court after her pay increase was withheld and she received negative performance evaluations from four reviewers in the Reston office but positive reviews from two reviewers in the Boston office. In court documents, she alleged claims under Title VII for gender discrimination, sexual harassment and retaliation. She also asserted a claim under the Equal Pay Act. She sought compensatory damages, back pay, front pay, punitive damages and reinstatement.

Before trial, the district court granted summary judgment in favor of Mintz Levin on Gallina's Title VII claims of gender discrimination and sexual harassment and her claim under the Equal Pay Act. The case then proceeded to trial under Gallina's Title VII retaliation claim. At the close of the evidence, Mintz Levin moved pursuant to Rule 50 for judgment as a matter of law. The district court denied the motion as to the retaliation claim, finding that credibility issues made this the "quintessential . . . jury case." However, the district court granted the motion as to Gallina's claim for punitive damages, noting that she failed to satisfy her burden of showing that Mintz Levin had not acted in good faith.

The jury then returned a verdict in Gallina's favor, awarding her $190,000 in compensatory damage and $330,000 in back pay. Mintz Levin renewed its Rule 50 motion on the retaliation claim, which the district court denied. The district court also denied Gallina's reinstatement and front pay claims. Both Gallina and Mintz Levin appealed. Gallina challenged the district court's dismissal of her punitive damages

The appellate court noted that in an appeal from rulings on Mintz Levin's Rule 50 motions, the facts are viewed in the light most favorable to Gallina, the non-movant. *Babcock v. BellSouth Adver. And Publ'g Corp.*, 348 F. 3d 73 (4th Cir. 2003).

Retaliation Claim

Under Rule 50(b), the court determines whether a jury, viewing the evidence most favorable to Gallina, "could have properly reached the conclusion reached by the jury." *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536 (4th Cir. 2003). If reasonable minds could differ about the result in the case, the court must affirm. *Id.*

To prove unlawful retaliation, Gallina had to show (1) that she engaged in a protected activity, (2) that Mintz Levin took an adverse employment action against her, and (3) that a causal connection linked the protected activity and the adverse action. *Id.* If Gallina successfully made the showing, Mintz Levin could defend itself by producing "evidence of a legitimate, non-discriminatory reason for taking the adverse employment action." *Id.* The jury then decides whether the adverse action was actually taken for the proffered reason, or whether that reason was merely pretext for retaliation. *Id.*

The court held that the evidence supported the jury's verdict in favor of Gallina on the retaliation claim. Gallina presented sufficient evidence at trial to establish that she engaged in a protected activity, the court said. Gallina's complaints regarding gender discrimination constituted protected activity under Title VII. See 42 U.S.C. §2000e-3(a). The court noted that Mintz Levin did not dispute that it took adverse employment actions against Gallina when it deferred her pay increase and ultimately terminated her and that Gallina presented enough evidence for a reasonable jury to find that Mintz Levin's pay deferral and firing were the result of her complaints about gender discrimination. Gallina also presented enough evidence sufficient for a reasonable jury to find that Mintz Levin's actions stemmed from her complaints about gender discrimination. The court noted, among other things, that Gallina was told that she had embarrassed the Reston office by complaining to the Boston office and that several months later, her pay increase was deferred and several months after that, she was fired.

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FEMALE ATTORNEY *continued from page 4*

"The jury could have reasonably inferred from this evidence that Gallina's pay deferral and firing were manifestations of Mintz Levin's retaliation claim against her," the court said. The court said that the reasonableness of this inference was buttressed by the fact that the reviewers from the Reston office gave Gallina negative reviews while the reviewers from the Boston office gave her positive reviews.

Punitive Damages

Gallina argued that the trial court erroneously granted judgment as a matter of law to Mintz Levin on her claim for punitive damages.

A Title VII plaintiff is entitled to punitive damages if her employer engaged in intentional retaliation "with malice or with reckless indifference to [her] federally protected rights." 42 U.S.C. §1981a(b)(1). This standard does not require "a showing of egregious or outrageous discrimination," but rather proof that the employer retaliated "in the face of a perceived risk that its actions will violate federal law." *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999). However, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." *Id.*

The court said that it had to decide whether the evidence, viewed in the light most favorable to Gallina, would have permitted a reasonable jury to return a verdict in her favor on punitive damages. *Anderson v. G.D.C., Inc.*, 281 F3d 452 (4th Cir. 2002).

Thus, the court said that it must determine whether (1) Gallina presented sufficient evidence for the jury to find that Mintz Levin, in the course of its unlawful retaliation, perceived the risk of violating Title VII and (2) whether Mintz Levin presented sufficient evidence such that a reasonable jury could only conclude that it engaged in good-faith efforts to comply with Title VII. The court noted in a footnote that it had agreed with other circuits that have held that it is the employer's burden to establish that it has engaged in good faith efforts to comply with Title VII. *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 655 (2d Cir. 2000); *Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000).

"We hold that Gallina presented evidence that is sufficient for a reasonable jury to find that Mintz Levin perceived the risk of violating federal law through its retaliation. A reasonable jury could have found that members of a prominent law firm, and especially a firm with an employment law section in the relevant office, perceived the risk of violating federal law in retaliating against an employee," the court said.

The court also held that Mintz Levin did not offer sufficient evidence such that a reasonable juror could conclude that the firm engaged in good faith efforts to comply with Title VII. Although the firm proffered evidence of the existence of a "sexual Harassment Prevention Training" manual and a contact person to deal with sexual discrimination issues, there was no evidence that Mintz Levin had any *specific* (emphasis in original) policy regarding retaliation. The only evidence of any policy was a reference in the "Sexual Harassment Prevention Training" manual, but there was no evidence that anyone at the firm was aware of that policy, nor that it was implemented or enforced, the court wrote in the opinion.

Thus, the lower court erred by disallowing Gallina's punitive damages claim to go to the jury, the court said.

But the entire court was not in agreement. **Circuit Judge Niemeyer** wrote a dissent, explaining that he would deny Mintz Levin's Rule 50 motion for judgment as a matter of law because Gallina failed, as a matter of law, to prove that her complaints regarding one of the former managing partner's behavior constituted protected activity. "In particular, the evidence on the severity and pervasiveness of [the former managing partner's] discriminatory conduct was too weak to support a jury finding that Gallina *reasonably* (emphasis in original) believed it to constitute a violation of Title VII. She also failed to prove that Mintz Levin's proffered reason for discharging her – that she was performing poorly – was pretextual," the judge wrote.

Dawn M. Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, United States Court of Appeals for the Fourth Circuit, No. 03-1883, Feb. 2, Unpublished.

DOL DECLINES TO GIVE PARALEGALS PROFESSIONAL STATUS

The **United States Department of Labor (**DOL) has issued opinion letters interpreting the Fair Labor Standards Act (FLSA). The opinion letters provide guidance on compliance issues and can also provide legal defenses.

In an opinion letter issued on January 7, 2005, DOL reaffirmed its longstanding position that paralegals and legal assistants do not qualify for the learned professional exemption. The agency received an inquiry from a paralegal with a four-year degree from an accredited university, a paralegal certificate and 22 years of experience. The writer also indicated that she was paid enough to satisfy the salary basis requirements under the revised regulations. Her employer recently reclassified her position to nonexempt status.

Under the FLSA, an employee employed in a bona fide professional capacity means any employee (1) compensated on a salary or fee basis at a rate of at least $455 a week; (2) whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

The primary duty test under the learned professional exemption at §541.301 includes three elements: (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. The phrase "work requiring advanced knowledge" means work which is predominantly intellectual and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. The phrase "customarily acquired by a prolonged course of specialized intellectual

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COMPANY SUCCESSFULLY DEFENDS RIGHT TO PREVENT EMPLOYEES' FORMATION OF RIVAL COMPANY

Bowe Bell and Howell was successful last month in defending the preliminary injunction it obtained against several employees who left the company to start a rival software company. In unpublished opinion, the **United States Court of Appeals for the Fourth Circuit** affirmed the "well-reasoned" opinion of the trial court.

BBH purchased the **Harris Group** in 1997. The Harris Group's primary asset was a software program, TransFormer and the software's intellectual property rights which included the provision of software maintenance to TransFormer users.

BBH required all of its employees and customers to agree to keep confidential all proprietary information related to TransFormer. Employees signed either a nondisclosure or a noncompetition agreement or both. Customers purchasing the product agreed to certain licensing terms which prohibited sharing the product with others without BBH's prior written consent.

Before one of the men involved in the lawsuit left BBH, he sent to another defendant, who had already left the company, BBH's 276-page customer list containing hundreds of customer names, contact information and service histories. This list was saved on a password protected BBH server which was accessible only by company employees.

After leaving BBH, Michael Brooks incorporated Trans-Print Services (TPS). In ads touting the company's products and services, TPS made 11 references to TransFormer and mentioned the Harris Group and BBH several times.

When BBH found out about the ads, the company sued, alleging federal copyright and trademark infringement and state law claims. BBH moved for a preliminary injunction enjoining the defendants from conducting any business related to the software. The district court granted BBH's motion. The court examined the (1) likelihood of irreparable harm to the plaintiff if injunctive relief were denied; (2) the likelihood of harm to the defendant if relief were granted; (3) the likelihood of success on the merits; and (4) the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co*., 550 F.2d 189 (4th Cir. 1977).

The court concluded that the "balance of hardships plainly favored BBH" because the evidence demonstrated a likelihood of success on the merits as to several of BBH's claims. For example, in transmitting the customer list, the court determined that a BBH trade secret was more than likely misappropriated. In addition, the court also decided that many of the defendants likely violated either their noncompetition or nondisclosure agreements with BBH.

The court also observed that the public interest favored granting the injunction because the public has an interest in enforcing restrictive covenants that protect business interests and that the public has an interest in preventing the misleading and deceptive use of trademarks and the infringement of copyrights. The district court noted that many of these violations could not be compensated by money damages.

In contrast, the court noted that the harm to the defendants was small because TPS's business was still evolving and involved working with software products aside from TransFormer. The court also pointed out that the "well educated" defendants could work with other types of computer software.

Thus, the appellate court affirmed the trial court's decision, applying an abuse of discretion standard and recognizing that "preliminary injunctions are extraordinary remedies." *Microstrategy, Inc. v. Motorola, Inc*., 245 F.3d 335 (4th Cir. 2001).

Bowe Bell & Howell Company v. Albert M. Harris, Michael Brooks, et al., United States Court of Appeals for the Fourth Circuit, No. 04-2539, Unpublished, July 15, *Per curiam*.

DOL DECLINES *continued from page 5*

instruction" restricts the exemption to professions where specialized academic training is a standard for entrance into the profession. The best *prima facie* evidence that an employee meets this requirement is possession of the appropriate academic degree.

DOL told the letter writer that her position as a paralegal is covered by the overtime and minimum wage provisions of the FLSA. The agency pointed out that §541.301(e)(7) provides that paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals have a four-year degree, many two-year colleges offer paralegal programs, DOL said.

The agency further explained that the learned professional exemption is available to paralegals that possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases, that engineer would qualify for the exemption.

The letter was signed by Deputy Administrator **Alfred Robinson, Jr**.

Companionship Services

In a letter dated March 17, 2005, DOL said it has not changed its policy regarding the companionship services exemption contained in §13(a)(15) of the FLSA and interpreted in 29 CFR 552.109(a) in light of the court's holding in *Coke v. Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004).

DOL said that employees engaged in companionship services, as defined in 29 CFR 552.6, who are employed by a third party are exempt from the minimum wage and overtime requirements of the FLSA and that the August 16, 2002 opinion letter signed by former Administrator **Tammy McCutchen** applies outside the jurisdiction of the Second Circuit. The letter was signed by Deputy Administrator Alfred B. Robinson, Jr.

VIRGINIA LAW STUDENT ALLOWED TO SUE STATE SCHOOL THAT RECEIVES FEDERAL FUNDS FOR DISABILITY DISCRIMINATION

The Eleventh Amendment does not bar a **George Mason University** law student's disability discrimination and First Amendment retaliation claims because Congress abrogated the states' immunity under Title II of the Americans with Disabilities Act, the **United States Court of Appeals for the Fourth Circuit has** ruled in a published opinion.

"We conclude that the Eleventh Amendment poses no bar to [**Carin**] **Constantine**'s claims because Congress validity abrogated the States' immunity to suit under Title II of the ADA; the State waived its immunity to suit under §504 of the Rehabilitation Act with respect to GMU . . . . We further conclude that Constantine's complaint adequately alleges claims for disability discrimination in violation of Title II of the ADA and §504 of the Rehabilitation Act, as well as a First Amendment retaliation claim under §1983. Accordingly, we reverse the judgment of the district court and remand this case for further proceedings," **Judge Shedd** wrote.

Constantine was a law student at GMU, a state university that receives federal funds. While taking her final in constitutional law, Constantine, who suffered from "intractable migraine syndrome" developed a migraine headache. She alerted the exam administrators of her plight and requested additional time to complete the exam, but they refused. Constantine failed the test. She failed the exam a second time when she was eventually allowed to re-take it. Constantine claimed that, GMU decided in advance to give her a failing mark on the exam in retaliation for her public criticism of the university's handling of the matter.

Constantine sued The Rectors and Visitors of George Mason University and several members of GMU's law school faculty (University) claiming retaliation under the First Amendment and disability discrimination under Title II of the Americans with Disabilities Act (ADA). The defendants moved to dismiss on the ground that (1) the 11th Amendment barred all claims against GMU and the individual defendants in their official capacities and (2) the complaint failed to state a claim upon which relief could be granted. The district court declined to rule on the 11th Amendment issues but dismissed the complaint for failure to state a claim. The appeals court reversed and remanded.

ADA Claim

Constantine argued that Congress abrogated the states' Eleventh Amendment immunity when it enacted Title II of the ADA. Title II forbids public entities from excluding disabled persons from programs, services or benefits by reason of their disabilities. 42 U.S.C. §12132. Title II also imposes an obligation to make "reasonable modifications to rules, policies or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services" to enable disabled persons to receive services or participate in programs or activities. *Id*.

The University argued that the case is controlled by *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002), in which the court held that Title II of the ADA does not abrogate the States' Eleventh Amendment immunity. The *Constantine* court rejected that contention, explaining that while *Tennessee v. Lane*, 124 S.Ct. 1978 (2004) specifically overruled *Wessel* only with respect to the application of Title II to cases involving the right of access to courts, the reasoning of *Lane* rendered *Wessel* obsolete. The court in *Lane* found that Congress enacted Title II of the ADA in response to a pattern of unconstitutional conduct by states and nonstate governmental entities. In addition, *Lane* specifically rejected the notion – crucial to the analysis in *Wessel* – that Congress may enact §5 legislation only in response to unconstitutional conduct by the States themselves.

Congress may abrogate the states' Eleventh Amendment immunity but only by stating unequivocally its desire to do so and only pursuant to a valid exercise of constitutional authority. *Seminole Tribe of Fla. V. Florida*, 517 U.S. 44 (1996). The ADA provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. §12202.

"This provision clearly and unambiguously expresses congressional intent to abrogate the States' Eleventh Amendment immunity with respect to claims brought under the ADA," the court said. As a result, the Eleventh Amendment posed no bar to Constantine's claims under Title II of the ADA.

Rehabilitation Act Claim

Constantine also alleged that GMU, a recipient of federal funds, violated §504 of the Rehabilitation Act when it discriminated against her on the basis of her disability. In response to the University's Eleventh Amendment defense, Constantine contended that GMU waived its immunity when it accepted federal funds.

Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability in the United States shall by reason of his or her disability be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving federal financial assistance. 29 U.S.C. §794(a). Section 504 is enforceable through private causes of action. *Barnes v. Gorman*, 536 U.S. 181 (2002). The states are not immune from federal suits to enforce this provision. 42 U.S.C. §200d-7.

A state may waive its Eleventh Amendment immunity and consent to suit in federal court. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Generally, there are two ways for a state to waive its Eleventh Amendment immunity: (1) expressly in a state statute or constitutional provision as long as the provision explicitly specifies the state's intention to subject itself to suit in federal court; or (2) implicitly by voluntarily participating in federal spending programs when Congress expresses a

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VIRGINIA LAW STUDENT ALLOWED TO SUE STATE SCHOOL *continued from page 7*

clear intent to condition participation in the programs on a state's consent to waive its constitutional immunity. *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999).

The court said that, as in Title VI of the Civil Rights Act and Title IX of the Education Amendments, §504 of the Rehabilitation Act invokes Congress' power under the Spending Clause of the United States Constitution. Such legislation is "much in the nature of a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions. *Barnes v. Gorman*, 536 U.S. 181 (2002).

In *Litman*, the court held that the Eleventh Amendment waiver condition in §2000d-7, in the context of a Title VII action, represented a valid exercise of the spending power as §2000d-7 is an unambiguous condition requiring waiver of Eleventh Amendment immunity and that such a condition does not violate any other constitutional command. "Because §2000d-7 applies equally to §504 cases and Title IX cases, our holding in *Litman* forecloses GMU's initial argument that Congress may not exercise its spending power to condition receipt of federal funds on a waiver of Eleventh Amendment immunity," the court said.

However, it pointed out that *Litman* did not address the University's other arguments that (1) the waiver condition is not related to the purpose of the federal spending, (2) the waiver condition is unduly coercive, and (3) any waiver was not knowing because GMU did not believe it had any immunity to waive when it accepted federal funds.

The court rejected the University's argument that the waiver condition in this instance is invalid because it was not related to any particular spending program, pointing out that the Supreme Court has upheld other spending conditions that are equally broad. *Lau v. Nichols*, 414 U.S. 563 (1974).

The Supreme Court has also noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203 (1987). The coercion inquiry focuses on the "financial inducement offered by Congress." The court held in *South Dakota* that the federal statute conditioning receipt of federal highway funds on a state's adoption of a minimum drinking age of 21 was not unduly coercive based on the relatively small size of the federal grant that that state risked losing. In this case, the court said, GMU offered no estimate of the degree to which it actually relied upon federal funds and the court chose not to "simply presume" that the state's capacity for free choice was "overcome by the prospect of financial assistance from the federal government."

Thus, the court concluded that GMU waived its Eleventh Amendment immunity with respect to Constantine's claims for damages under §504 of the Rehabilitation Act.

The court also found that the facts in the case did not support the University's contention that GMU did not know it had any Eleventh Amendment immunity to waive when it accepted federal funds. When GMU accepted the funds in 2003; although the court had made no pronouncement concerning abrogation under the Rehabilitation Act, the Second Circuit in *Garcia v. SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001) recognized that a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity.

GMU waived whatever Eleventh Amendment immunity it had when it accepted federal funds under a statute that clearly and unambiguously conditioned receipt of such funds on a waiver of immunity, the court said.

Rule 12(b)(6) Dismissal

Because the Eleventh Amendment did not bar Constantine's claims under the ADA and the Rehabilitation Act, the court then considered the court's dismissal of those claims under Rule 12(b)(6). Dismissal is not appropriate under Rule 12(b)(6) unless it appears certain that the plaintiff can prove no set of facts which would support a claim and entitlement to relief. *Mylan Labs*. 7 F.3d Under the disability discrimination statutes, a plaintiff must show that she was excluded from participation in, or denied the benefits of, a program or service offered by the public entity or subjected to discrimination by that entity. 42 U.S.C. §12132, 29 U.S.C. §794(a).

Constantine's complaint alleged, among other things, that she was unable to complete the exam because of her disability and that the defendants initially refused to accommodate her disability by giving her additional time to complete the exam. The court said that, if true, then Constantine could demonstrate that the defendants excluded her from meaningful participation in the course or at least discriminated against her with respect to the course.

Carin Manders Constantine v. The Rectors and Visitors of George Mason University, et al., United States Court of Appeals for the Fourth Circuit, No. 04-1410, June 13, Published, Judge Shedd.

SETTLEMENT AGREEMENT

In one of the largest settlements in recent years, Gaithersburg, Md.-based **Sodexho, Inc**., a food services company, has agreed to pay $80 million to settle a lawsuit by thousands of African-American employees who claimed they were often denied promotions and segregated within the company. The agreement also requires the company to provide promotion incentives, monitoring and training.

Several mid-level managers filed the lawsuit earlier this year against Sodexho's corporate predecessor, alleging that they had been denied promotions that went to lesser-qualified Caucasian managers.

Under the terms of the settlement, the managers who filed the suit will each get about $120,000. The other class members, about 3,000 other salaried African-American workers who worked for the company between 1998 and 2004, will receive about $2,000 each.

FORMER PORT DEPOSIT EMPLOYEE ALLOWED TO TAKE PRESENT DUE PROCESS CLAIM TO JURY

A former Port Deposit clerk/treasurer who was fired after claiming that town funds and equipment were used improperly was not wrongfully discharged but will get to proceed further on her claim that her due process rights were violated. In an unreported opinion, the **Court of Special Appeals** upheld much of a lower court's findings against **Kathy Cullum**.

"We hold that the circuit court erred in relying on the doctrine of collateral estoppel to dismiss [Cullum's] due process claim," the court said, finding, in part, that fairness precluded the applicability of the doctrine to the woman's case.

Cullum sued after she was terminated from her job as clerk/treasurer of the Town of Port Deposit. She was appointed in 2001. Not long after she began the job, she noticed what appeared to be "improper uses of Port Deposit's resources." For example, she reported that the police chief's car was used for "barhopping" trips to Fell's Point in Baltimore City as well as trips to Florida and Maryland.

She sued the town, its former mayor, its former town administrator and its former deputy administrator (Town) in the **Circuit Court for Cecil County** for wrongful discharge, violation of constitutional due process rights, defamation, negligence and civil conspiracy. Cullum said she was forced to submit to a mental health examination to determine whether she could "get along with people" and that the then mayor instructed a city official to compile a list of grievances that coworkers harbored against her job performance.

When the case landed back in circuit court after a remand to federal court because of the due process claim, the trial court dismissed all but one count and granted the Town's motion for summary judgment on the remaining count.

When the case came before the **Court of Special Appeals**, the appellate court reversed and remanded on the due process claim but affirmed the rest of the decision.

Collateral Estoppel

Cullum argued that the trial court erred in dismissing the state due process claim on the basis of collateral estoppel because the federal court's order was not a final decision on the merits but was "more akin to a practical solution or housecleaning decision." The Town argued that the federal court clearly determined that the facts of Cullum's complaint did not state a cause of action under the Fourteenth Amendment and, because the federal and Maryland due process provisions are construed *in pari material*, the federal decision estopped Cullum from relitigating identical issues in her state constitutional claim.

"We cannot countenance so strained an interpretation of the federal order of dismissal," the court responded. "Rather than simply remanding the case as properly removed, the federal judge expressly granted [the Town's] motion to dismiss the 'purported' federal claim, with prejudice. He concluded that, as a matter of law, [the Town's] complaint failed to state a federal claim upon which relief could be granted."

Cullum also argued that the federal remand order was not appealable under 28 U.S.C. §1447(d), and therefore it could not constitute a final order for purposes of collateral estoppel. Section 1447(d) states in part that an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise.

The Fourth Circuit has recognized that "finality for purposes of collateral estoppel is a flexible concept and may mean little more than that the litigation of particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987).

In this instance, the court said it saw "two really good reasons" not to give preclusive effect to the lower court's decision. First, while the availability of appellate review was not always an essential predicate of estoppel, the unavailability of appellate review strongly mitigated against giving a judgment preclusive effect. *Nutter v. Monongahela Power Co.*, 4 F.3d 319 (4th Cir. 1993). Cullum could have pursued an appeal to the Court of Appeals but, as a practical matter, that appeal would have been of no value to her, because, having urged the trial court to remand her case because she did not plead a federal due process claim, she could not argue on appeal that she had, in fact, pleaded such a claim, the court observed.

Secondly, under the unique circumstances presented, "it would be unfair, and therefore, inappropriate to apply collateral estoppel," the court said. The application of collateral estoppel remains subject to considerations of fairness. *Swentek*.

As a result, the court concluded that, under the unusual circumstances of the case and explaining that it was not expressing an opinion on the merits of Cullum's due process claim, that the fairness required under the doctrine of collateral estoppel would be violated if it applied the doctrine in this instance.

Wrongful Discharge

The court then turned to Cullum's wrongful discharge claim, observing that it agreed with the Town's assessment that her arguments were confusing.

Wrongful discharge is the willful termination of employment by the employer because of the employee's alleged failure to perform in accordance with the employer's expectations where the termination is contrary to a clear mandate of public policy. *Shapiro v. Massengill*, 105 Md. App. 743 (1995). The provisions of a city charter do not rise to the level of a public policy of this state. The policy must be statewide, not merely applicable to the city. *Kramer v. Mayor and City Council of Baltimore*, 124 Md. App. 616 (1999).

According to the Port Deposit personnel policy, she served at the pleasure of the mayor and Town Council.

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VOLUNTEER FOR BALTIMORE CITY LIBRARY SYSTEM ALLOWED TO PROCEED TO TRIAL ON HER CLAIM OF AGE DISCRIMINATION

A 69-year-old volunteer for Baltimore's **Enoch Pratt Library** will be allowed to go to trial on her claim that the institution discriminated against her because of her age, the **United States District Court for the District of Maryland** ruled last month. The court refused to grant summary judgment, ruling that genuine issues of material fact did not lend the case to such a decision.

The court's decision had its beginnings in **Marion Hirsch**'s quest to turn her part-time volunteer position into a full-time volunteer position with the venerable library system. Hirsch, who has a bachelors degree in Fine Arts from **Syracuse University**, assumed the position of volunteer coordinator for the library in 1992. She came to the library with several years of volunteer experience in politics and municipal government. Hirsch worked 21 hours a week and was responsible for recruiting, screening and assigning volunteers throughout the library.

In 1997, frustrated by her inability to perform all of the tasks of the job in the time allotted, she sent a memo to the head of the Library's human resources office urging that the part-time position be converted to full time. In 2003, the change to full time was approved and the library advertised the newly created position internally and in the **Baltimore Sun**.

Required to compete for the position, Hirsch was ranked third. A 31-year-old woman who, the court opinion said, "was previously fired from her position as the volunteer coordinator for **Baltimore Reads**, while within the probationary period for that position" was offered the job. On the candidate recommendation form, one of the interviewers indicated that the woman "would be an additional outreach arm for youth."

When asked why she was losing her job, Hirsch claimed that one of the library's supervisors told her that "we want somebody who is going to be here a long time." The supervisor later denied making the statement.

Hirsch filed a charge of discrimination with the EEOC, alleging that she was fired because of her age. The EEOC filed suit in federal trial court against the **Mayor** and **City Council of Baltimore** (City) seeking reinstatement for Hirsch and injunctive and compensatory relief.

The ADEA makes it unlawful for an employer to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment because of the individual's age. 29 U.S.C. §623(a)(1). In order to establish that the firing was based on age, Hirsch could proceed under either the mixed-motive or pretext method of proof. Hirsch choose to proceed primarily under the pretext method of circumstantial proof.

Pretext Method of Proof

To prove her claim under the pretext method, Hirsch had to establish a *prima facie* case by demonstrating that (1) she is a member of the protected class; (2) she was qualified for the job and met the employer's legitimate expectations; (3) she was discharged despite her qualifications and performance; and (4) following her discharge, she was replaced by someone with comparable qualifications outside the protected class. *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998). If a plaintiff can make such a showing, the burden shifts to the employer to demonstrate a legitimate non-discriminatory explanation for the employment action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Once the defendant articulates such a nondiscriminatory explanation, the burden shifts to the plaintiff to prove that the defendant intentionally discriminated against the plaintiff.

The City did not dispute that Hirsch satisfied the first and third elements needed to establish a *prima facie* case of discrimination because she was over 40 and was discharged from her position. The City also acknowledged that Hirsch was replaced by a much younger employee. However, the City contended that Hirsch was unable to satisfy the second element because she was not adequately performing the job.

The court decided the case should be sent to the jury because genuine issues of fact existed as to whether Hirsch was performing adequately. In support of its case, the City offered affidavits from library employees citing specific instances in which Hirsch was allegedly unable to recruit volunteers and alleging an inability to work well with branch managers.

"Yet, as acknowledged by Hirsch's supervisor, none of the alleged deficiencies in Hirsch's performance were ever documented or otherwise formally raised with Hirsch," the court said, noting that she had served in the position for 10 years. The court also noted that Hirsch had presented testimonial evidence that rebutted some of the complaints voiced in the affidavits.

"Based upon this conflicting evidence, there is a genuine issue of material fact which precludes summary judgment on [Hirsch's] age discrimination claim," the court said.

Mixed Motive Analysis

Hirsch also offered direct evidence to establish that age played a role in the City's decision to fire her. Under the "mixed motive" method of proof established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the plaintiff has the initial burden of proving through direct evidence that age was a substantial motivating fact in the employment decision. Upon such a showing, the defendant must prove that it would have made the same decision even absent its consideration of the plaintiff's age. To demonstrate that age was a substantial motivating factor under *Price Waterhouse*, Hirsch had to show (1) that she was covered by the ADEA, (2) that Hirsch suffered an unfavorable employment action by an employer covered by the Act and (3) that it occurred under circumstances in which the employee's age was a determining factor, in that but for the employee's age, the employee would not have suffered the adverse action.

The court said the first two elements were undisputed – that Hirsch was in the protected age category and that she was fired. To satisfy the third element, Hirsch offered the supervisor's statement that "we want somebody who is going to be here for a long time" and an interviewer's statement that the woman chosen would be "an additional outreach arm for youth."

The court responded that there existed a factual dispute as to whether one of the statements was made because the supervisor denied making the statement. Further, the court commented, the disputed fact was

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APPEAL S COURT DENIES STATE TROOPERS' REQUEST TO VIEW DOCUMENTS RELATING TO COMPLAINTS ABOUT PROMOTION PROCESS

Several state troopers were unsuccessful in their attempt to review documents stemming from their complaints that the promotion process used by their employer was arbitrary. In an unreported opinion, the **Court of Special Appeals** ruled against them.

The request to view the papers was made by several state troopers who sought but did not receive promotions. In March 2001, the officers complained to the **Maryland State Police** that the promotion process was "arbitrary and capricious" in violation of the Maryland Fair Practices Law, Md. Code §5-201 *et seq*. of the State Personnel and Pensions Article (SPP). The ensuing investigation determined that, while the process could stand improvement, it was neither arbitrary nor capricious and that no evidence of discrimination was discovered. The officers then requested a look at the documents used in the investigation.

The **Department of Budget and Management** (DBM) made a final agency decision denying the request under the Maryland Public Information Act (MPIA). DBM ruled that under SG §10-615(2)(i), denial was required because inspection would be contrary to SPP § 5-214. SPP §5-214 provides that information provided as part of an investigation conducted under the Fair Practices Law, SPP §5-201 et seq., is confidential within the meaning of the MPIA.

The officers asked the **Circuit Court for Anne Arundel County** to review the agency's decision. The trial court affirmed. In an unreported opinion, the appellate court also affirmed the decision against the officers.

The troopers contended on appeal that denying them access to the records of the investigation was legally incorrect because (1) DBM waived SG §10-615 and SPP §5-214 as grounds for denying inspection because it had not raised those responses in response to the request to inspect the documents; and (2) notwithstanding SG §10-615, they were entitled to inspect the documents under SG §10-616(i)(2)(i), because they are "persons in interest."

Disclosure of Non-Disclosable Documents

The court responded that it did not find any merits in the argument. SG §10-615 mandates, without exception, that a custodian deny inspection of certain records. The court explained that under *Stromberg Metal Works, Inc. v. Univ. of Md*., 382 Md. 151 (2004), the state's top court rejected the argument that if the custodian of documents failed to deny the application within the prescribed time that it was not permitted to deny the request. The court reasoned that requiring disclosure of otherwise non-disclosable records as a sanction for violating an MPIA statutory time limit was unnecessary and would contravene one of the purposes of the MPIA, which is to protect certain documents from public disclosure.

The court also rejected the officers' reliance on SG §10-616 declaring that SG §10-615 controls. Under that section, the DBM was *required* (emphasis in original) to deny inspection of the public record when the inspection would be contrary to a state statute. Section 5-214, the court said, declared that information obtained as part of an investigation under the Fair Practices Law is confidential. Accordingly, the court concluded, DBM was required to deny inspection of the requested records although the basis for non-disclosure was not asserted by the DBM in a timely fashion.

Officers Were Not Persons In Interest

SG §10-616 governs required denials for certain specific types of records, namely, personnel records. The statute provides that a custodian shall deny inspection of a personnel record of an individual, except that the custodian shall permit inspection by, among others, a "person in interest." SG §10-616(i)(2)(i). Personnel records, the court explained include "an application, performance rating or scholastic achievement information."

SG §10-616 didn't apply, the appellate court said, because the records the officers sought were "clearly" not personnel records. Rather, the court explained, the records concerned the officers' complaints with the agency. "Accordingly, regardless of whether the [officers] were "persons in interest" for purposes of §10-616, disclosure properly was denied under SG§10-615," the court said.

Wellington Gray, et al. v. Department of Budget and Management, Court of Special Appeals, No. 1295, Unreported, June 13, Judge Eyler.

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The court observed that Cullum seemed to be arguing that she was fired for performing her job duties, as defined in the town's personnel policy and that the firing violated a clear mandate of public policy, i.e., that she should perform her duties. The Town argued that she had failed to identify the public policy supporting her claim and, had thus, failed to plead a wrongful discharge cause of action.

The court said that Cullum's job duties appeared in Port Deposit's local personnel policy, not in anything demonstrating a statewide policy. As a result, the duties described in the personnel policy could not form the basis for Cullum's public policy argument.

Defamation

Similarly, the court also rejected Cullum's defamation claim against the then Town Administrator, holding that the comments attributed to him – that before Cullum unexpectedly left her position the town had an accounting problem – were absolutely privileged under C.J. §5-501.

Kathy Cullum v. Town of Port Deposit et al., Court of Special Appeals, No. 1230, Unreported, June 13, Judge Davis.

MORGAN STATE UNIVERSITY WORKER'S CLAIMS AGAINST SCHOOL BARRED BY SOVEREIGN IMMUNITY

A former veteran worker for **Morgan State University** was unsuccessful in court on her claim that the Baltimore City-based university discriminated against her because of her age. The **United States District Court for the District of Maryland** ruled that MSU is entitled to sovereign immunity in regard to her claims.

Cynthia Laney, who had been employed by the school for 33 years, sued *pro se* after she was laid off. Laney said that she was replaced by a younger worker. She also alleged that 10 of the 11 other employees who were also laid-off were over the age of 40. She said that the university retaliated against her for speaking out against MSU gaining autonomy and made a claim under Title VII of the Civil Rights Act of 1964.

MSU filed a motion to dismiss, arguing that the school is entitled to sovereign immunity under the Eleventh Amendment of the United States Constitution as to Laney's claims under the Age Discrimination in Employment Act (ADEA) and for retaliation. MSU also contended that Laney failed to state a claim under Title VII. **Judge Blake** granted the university's motion.

The Eleventh Amendment prohibits suit in federal court by private individuals against a state unless the state has consented to suit and/or Congress has lawfully abrogated the state's immunity. *Ballenger v. Owens*, 352 F.3d 842 (4th Cir. 2003).

"Maryland has not consented to suit in federal court," the court wrote. Though Congress attempted to abrogate the states' immunity in enacting the ADEA, the **United States Supreme Court** has held that the ADEA "did not validly abrogate the States' sovereign immunity to suits by private individuals." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

Courts have consistently held that Maryland's public state universities are "arms of the state," entitled to protection under the Eleventh Amendment. *Maryland Stadium Authority v. Ellerbe Becket Inc.*, 407 F.3d 255 (4th Cir. 2005). While most of the opinions specifically address the **University of Maryland at College Park**, courts have noted that this protection also extends to MSU. *Moreno v. University of Maryland*, 420 F.Supp. 174 (D. Md. 1981).

The court rejected Laney's argument that MSU forfeited sovereign immunity by choosing not to be under the umbrella of the University of Maryland. Regardless, the court said, MSU, is a state institution having been created as the state's public urban university.

The court also dismissed Laney's Title VII claim, explaining that age discrimination was not covered by that federal law. However, the court dropped a hint for Laney, noting that no determination had been made as to whether she might have a claim in state court.

Cynthia Laney v. Morgan State University, United States District Court for the District of Maryland, Civil No. CCB-04-1719 (ECF-Exempt), Unpublished, June 30, Judge Blake

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VOLUNTEER FOR BALTIMORE CITY LIBRARY SYSTEM *continued from page 10*

material in light of a recent finding by the Fourth Circuit that an employer's statement that a much younger employee could give the employer more years clearly reflected the employer's reliance on the employee's age as one of the reasons for the termination. *EEOC v. Warfield-Rohr Casket Co*., 364 F.3d 160 (4th Cir. 2004)(See *Maryland Employment Law Reporter* July 2004 and July 2005).

However, the court pointed out that not all statements about age automatically carry animus. Statements about age, unlike statements about race or gender, do not rest on a "we/they" dichotomy and, therefore, do not create the same inference of animus because everyone expects to someday grow old. *Dockins v. Benchmark Communications*, 176 F.3d 745 (4th Cir. 1999).

As a result, the court denied both motions for summary judgment and ordered that the case proceed to trial.

Equal Employment Opportunity Commission v. Enoch Pratt Free Library, et al., United States District Court for the District of Maryland, Case No. RDB-03-2727, July 19, Unpublished.

NEWS FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Prompted by the **United States' Supreme Court**'s decision in *National Railroad Passenger v. Morgan*, 536 U.S. 101 (2002), the EEOC has issued a revision to its Compliance Manual section on "threshold issues." The revision addresses time limitations on filing charges of employment discrimination with the agency. The new information is available from the EEOC's web site.

Threshold issues are requirements that an individual must satisfy in order to have a legal claim under the EEO statutes. When a charge is filed with the EEOC, the investigator determines whether threshold requirements are satisfied before considering the substantive claim of discrimination.

In *Morgan*, the court ruled that the timeliness of an employment discrimination charge depends upon whether it involves a discrete act or a hostile work environment claim. A discrete act is only independently actionable if it occurred within the filing period. In contrast, all of the incidents that make up the same hostile work environment claim are actionable as long as at least one incident occurred within the filing period.

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The EEOC has issued a document that addresses the ADA's application to people with cancer. The document, issued in question-and-answer form, addresses such topics as when cancer is considered to be a disability under the ADA, when an employer may ask an applicant or employee questions about cancer, voluntary disclosures and what types of reasonable accommodations employees with cancer may need.

Commission Chair Cari M. Dominguez said that people diagnosed with cancer still experience discrimination based on "stereotypes and unfounded fears." She explained that simple accommodations such as leave or a flexible schedule to allow for treatment make it possible for many people with cancer to continue to be valuable contributors in the workplace.

WORKER WHO DID NOT REPORT EXTRA HOURS TO EMPLOYER LOSES OUT ON OVERTIME CLAIM

Although a local mortgage company was unable to show that a loan officer qualified as an outside salesperson exempt from the Fair Labor Standards Act's (FLSA) overtime and minimum wage rules, **Freedmont Mortgage Corporation** was successful in defeating the worker's claim that the company violated the FLSA because the man did not report the extra hours.

Michael McLaughlin was a loan officer with the company for two years. He was paid a commission on the loans he sold in accord with his employment contract. McLaughlin solicited his own clients and was also given leads that were generated by Freedmont's advertising. He worked in Freedmont's offices one day out of the week but, otherwise, was free to work from home or elsewhere.

Freedmont did not maintain records of the people McLaughlin met or the people to whom he sent loan applications. McLaughlin also did not keep any records of the time he worked.

McLaughlin filed a five-count complaint against **Freedmont Mortgage Corporation** and **Kevin Murphy**, the president of Freedmont, alleging violations of the Fair Labor Standards Act (FLSA) and Maryland state law. Last year, the court granted the defendants' motion for summary judgment on two counts and their motion to dismiss on one count. Earlier this summer, in a published opinion, the court shot down McLaughlin's request to reconsider applying the treble damages remedy available under Maryland wage law to FLSA violations (see *Maryland Employment Law Reporter* July 2005).

In last month's unpublished opinion, the federal trial court ruled on the company's claim that McLaughlin was an outside salesman, exempt from the minimum wage and overtime provisions of the FLSA. McLaughlin claimed that, at various times during his employment, he worked more than 40 hours per week without receiving overtime pay and that for about 16 weeks, he was not compensated at all. The court decided in Freedmont's favor.

Outside Salesman

Freedmont contended that, because McLaughlin was an outside salesman, he was exempt from the FLSA's provisions requiring overtime and minimum wage pay. An outside salesman is defined as an employee (1) who is employed for the purpose of and who is customarily engaged away from the employer's place of business in making sales or obtaining orders or contracts for services; and (2) whose hours of work of a nature other than that just described do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer.

The court noted that the rules adopted in 2004 redefining outside salesman removed the restriction that outside sales employees could not do inside sales work for more than 20% of the hours worked in a week by nonexempt employees. However, because this case was filed prior to the modification, the 20% restriction applied.

Work performed incidental to and in conjunction with the employee's own sales or solicitations, however, is not considered nonexempt work that counts towards the 20% limit. 29 C.F.R. §541.500(b). Further, an outside sales employee must make sales at the customer's place of business or home. 29 C.F.R. §502(b). In addition, sales made via mail, telephone or the internet are not outside sales. *Id*.

The employer bears the burden of proving the exemption by clear and convincing evidence. *Stricker v. Eastern Off Road Equip., Inc*., 935 F.Supp. 650 (D.Md. 1996). The FLSA exemption is narrowly construed by the employer who asserts it. *U.S. Dept. of Labor v. North Carolina Growers Ass'n*, 377 F.3d 345 (4th Cir. 2004).

McLaughlin contended that Freedmont failed to satisfy its burden because it did not keep records of his time. Freedmont insisted that a case-by-case analysis had to be undertaken to determine if an employee falls within the exemption. *Nielsen v. Devry, Inc*., 302 F.Supp.2d 747 (W.D. Mich. 2003). Freedman relied on various criteria used in *Nielsen*, *Hodgson v. Krispy Kreme Doughnut Co*., 346 F.Supp. 1102 (M.D.N.C. 1972), *Fields v. AOL Time Warner, Inc*., 261 F.Supp.2d 971 (W.D.Tenn. 2003) and *Jewell Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941) that it said had to be considered to determine whether an individual is an outside salesperson.

These include: first, that the employee not only sells to existing customers but solicits new business. McLaughlin accomplished this by generating his own leads and fielding calls that were generated by advertisements, the court said. Second, the employee was hired as a salesperson and had that title. McLaughlin said he was hired as a salesperson as did his employment contract. Third, the employee had to be paid entirely or primarily from commissions on sales he makes. Fourth, the employee decides his own work schedule and the number of hours to be devoted to serving his sales territory. McLaughlin testified that he set his own schedule and, indeed, changed his routine in May 2003 to spend more time away from the office. Fifth, the employer does not direct, monitor or supervise the employee. The company said it hired McLaughlin with the understanding that he was in charge of his own time.

The court responded that it would assume that Freedmont had failed to show that McLaughlin met the definition of an outside salesman because it was not clear that McLaughlin engaged in sales activity away from his employer's place of business and because Freedmont did not meet its showing that McLaughlin worked on inside sales for less than 20% of the hours worked in a week by nonexempt employees.

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WORKER WHO SETTLED WORKERS' COMP CASE WITH THIRD PARTY CAN'T OBTAIN COMMISSION BENEFITS

A former worker for **Waste Management, Inc**. was unsuccessful in his pursuit of workers' compensation benefits because he elected to proceed against a third-party, the **Court of Special Appeals** has ruled in an unreported opinion.

Richard Wolf worked for **Waste Management**, **Inc**., a private trash collection company, as a hauler. In 2000, he was struck by a car while loading trash into a truck. Wolf's injuries included the loss of his right leg above the knee. He settled his claim for $100,000, the insurance limits of the man who hit him, through attorney **Richard Oare**. Waste Management's workers' compensation carrier at the time was **Pacific Employers Insurance Company**, **ACE-USA Group** (ACE).

Two years later, Oare filed a workers' compensation claim against Waste Management. The company contested the action, asserting that Wolf had elected to pursue his remedy against a third party, and that, under §9-901 of the Labor and Employment article, his workers' compensation claim was barred. The commissioner agreed.

L&E §9-901 permits a covered employee to obtain compensation under the Workers' Compensation Act and then to pursue a tort claim against a third-party wrongdoer or to simultaneously pursue compensation and a tort action. *Franch v. Ankney*, 341 Md. 350 (1996). The employee may not, however, pursue a tort remedy to conclusion and then file for and receive compensation. *Johnson v. Miller*, 188 Md. 455 (1947).

Court Proceedings

Wolf filed an appeal with the **Circuit Court for Frederick County**. The trial court granted Waste Management's motion for summary judgment, determining that Wolf was not allowed to receive benefits because the undisputed material facts indicated that Wolf was barred from obtaining benefits because he had elected a remedy against a third party. The appellate court affirmed.

The appeals court noted that Wolf did not dispute that he settled his third-party claim in 2000 without the consent or authority of Waste Management and that he filed his claim with the Commission almost two years later on June 19, 2002.

However, Wolf argued that there were genuine disputes of fact as to whether Waste Management's claim representative and/or the nurse case manager assigned to Wolf's case breached a duty to immediately file his compensation claim under L&E §9-712 and that those facts were material. The L&E §9-712 filing duty on the part of an insurer is triggered if the employer or its insurer directs or requests a covered employee to submit the claim application form to the insurer and the insurer receives the claim application form.

ACE's claim representative, **Mary Kline**, arranged for ACE to begin paying temporary total disability benefits, medical expenses and some rent shortly after Wolf was injured. She also arranged for a nurse case manager, **Brenda Gude**, to manage Wolf's case. When Kline went to visit Wolf at the hospital, she gave him a blank claim form and told him to complete it. Wolf did not complete the claim form at the time. Later, **Oare** faxed a letter to Kline explaining that he was representing the man.

Wolf later testified that, because he did not have his glasses, Kline asked him questions and filled out papers for him. Wolf recalled that Kline had to rewrite his social security number because she "had it written wrong." On the form completed on August 14, two digits in

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WORKER WHO SETTLED WORKERS' COMP CASE *continued from page 14*

Wolf's social security number are overwritten. Wolf testified that the signature on the form was his. However, he also testified that he did not recall filling out the form.

Oare later mailed Gude a completed claim form dated September 1. Wolf testified that the signature on the September 1 claim form was his but that the rest of the handwriting on it was not. The claim identified Oare as Wolf's attorney. Thinking that the forms were sent to her in error, Gude placed them in her file.

Waste Management argued that Wolf's deposition testimony was legally insufficient to generate a genuine dispute of material fact as to whether Kline ever received a completed claim form from Wolf so as to have triggered a duty to file the claim form under L&E §9-712. The company also argued that the undisputed facts established that Gude was not an agent of an employer or insurer and, therefore, had no duty to file the completed form she had in her possession on the day she faxed it to Oare.

Testimony Failed to Prove Claim Form was Completed

The standard for deciding whether there is a triable issue of fact presented on a summary judgment is "highly analogous" to the standard for granting a motion for judgment in a jury trial. *Pittman v. Atlantic Realty Co*., 358 Md. 513 (2000). The test is whether the evidence of the non-movant would allow a reasonable trier of fact to conclude that, in actuality, the facts were those most favorable to the non-movant. *Id*.

The court said that most of Wolf's deposition testimony did not counter Kline's deposition testimony that she left the room on August 14 without a completed claim form and, as a result, never received a claim form that she had a duty to file. The court also said that Wolf's assertions tended to show that either Wolf did not know whether Kline received a completed claim form on August 14 or Kline did not receive a completed claim form that day. "None of Wolf's assertions tend to show that Kline received a completed claim form from Wolf on August 14," the court said.

Testimony that is inconclusive and uncertain, amounting to mere speculation lacks any probative force and is not legally sufficient to be the basis of a factual finding. *Slacum v. Jolley*, 153 Md. 343 (1927). "Assuming a reasonable fact-finder would fully credit Wolf's testimony and give it maximum weight, the most it could find without resorting to guesswork is that Wolf does not know whether Kline received a completed claim form on August 14 (or any other day). Wolf's testimony thus lacks any probative force as to whether Kline received a completed claim form that she would have had a duty to file," the court wrote.

In addition, the evidence presented regarding Gude was sufficient to show that she was in receipt of the September 1 claim form; however, it was not sufficient to show that Gude was an agent of Waste Management or ACE. Wolf did not offer any evidence on summary judgment to show that Gude was an agent of Waste Management or ACE, the court observed.

"Because we conclude that there was not a genuine dispute of fact as to whether Kline received a completed claim form from Wolf, or as to whether Gude was an employer or insurer under LE section 9-712, we need not address the materiality of those facts, if they could be proven," the court said.

Richard Wolf v. Waste Management, Inc., Court of Special Appeals, No. 1142, June 13, Unreported, Judge Eyler

WORKER WHO DID NOT REPORT EXTRA HOURS *continued from page 13*

No Records Kept

The court then said that McLaughlin had the burden of establishing the hours he claimed to have worked and the work he claimed to have performed for which he was not paid. *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946). In a situation where the employer does not have records of the employee's hours, an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable interference. *Anderson*.

McLaughlin did not have to give exact evidence of the hours he worked. *Pforr v. Food Lion, Inc*., 851 F.2d 106 (4th Cir. 1988). After he produced his evidence, the burden shifted to Freedmont to negate the inference drawn from McLaughlin's proffer. *Anderson*.

The court pointed out that neither Freedmont nor McLaughlin kept records of the worker's hours although McLaughlin testified at a deposition that his typical workday was 11:00 to 7:00 p.m. or 12:00 to 8:00 p.m. and his interrogatory responses to Freedmont stated that his work hours ranged from 40 to 55 hours a week. "That estimate, averaged out to 47 hours a week, appears to be the principal, if not the only, basis on which McLaughlin would calculate his 'uncompensated' hours," the court observed. McLaughlin argued that his estimates were sufficient for a "just and reasonable inference." But he also admitted that he never reported his hours to Freedmont and the company did not supervise his work. As a result, the court declared that McLaughlin had not met his burden of showing "just and reasonable inference" of either the uncompensated hours he worked or the number of uncompensated hours Freedmont "suffered" or "permitted" him to work.

Michael McLaughlin v. Kevin Murphy, et al., United States District Court for the District of Maryland, Civil Action No. CCB-04-767, July 26, Unpublished.

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