INSIDE THIS ISSUE

4 Lack Of Burden-Shifting Jury Instruction Not Fatal To Caregiver's Claim Against Employer

5 Formulaic Volunteer Early Retirement Program Lacks Administrative Scheme Necessary For ERISA To Apply

6 Governor Vetoes Fair Share Health Care Act

7 Notice Required In LGTCA Cases Can Not Be Eliminated By Claiming That Employee Acted Outside Scope Of Employment

7 Governor Vetoes Bill To Increase Minimum Wage

8 Officer's Failure To Raise Arguments Before Hearing Board Forbids Use Of The Arguments During Judicial Review

9 Frederick County Execs Can't Use Public Official Immunity In Defending Themselves In Lawsuit

10 Court Upholds Arbitration Agreement Because Of Self-Imposed Notice Requirement

11 Currency Transporter Defeats Claim Made By Man Who Says Company Drivers Aimed A Gun At Him On Highway

12 Order To Reclassify State Workers' Positions Within Scope Of ALJ's Authority

12 Supreme Court Hears Case Involving Statute of Limitations In Constructive Discharge Originating in 4th Circuit

13 Attendance And Disciplinary Record Fails Correctional Officer's Bid To Reclaim Her Job

14 Employers Are Not Entitled To A Stay Of A Workers' Comp Award In Instances Of Judicial Review

15 Worker Who Claimed Discrimination Based On Pregnancy Allowed To Present Claim To Jury

June 2005

MARYLAND EMPLOYMENT LAW REPORTER

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COURT OF APPEALS OVERRULES *DELAMBO*

Maryland's top court has overruled one of the cases setting forth the factors used in determining whether state government employees should be fired. Last month, the **Court of Appeals** overruled *Maryland State Retirement Agency v. Delambo,* a case decided in 1999 by the **Court of Special Appeals**.

The high court's decision in *Maryland Aviation Administration v. Clifton F. Noland* represents a "big sea change" for attorneys who practice state government employment law because they were required to look at the factors listed in *Delambo* and make a finding, they no longer have to do that, said **Maureen M. Dove**, who argued the case for the **Maryland Aviation Administration** (MAA).

Last month's court holding stemmed from a paramedic who hit a patient. **Clifton F. Noland** was a paramedic for the MAA, a unit of the **Maryland Department of Transportation**. He was fired after twice striking a "combative psychiatric prisoner" who was being taken to North Arundel Hospital. In a final administrative decision, Noland was found to have violated "Management's Workplace Violence Policy and fired.

Delambo involved a final administrative decision removing a state government employee for misconduct. The case listed five factors that must be taken into account before an agency can fire an employee. Those factors include the employee's overall employment history, work habits, attendance record, disciplinary record and relations with fellow employees and supervisors.

Continued on page 2

MARRIOTT SUCCESSFULLY DEFENDS ITSELF AGAINST CONFLICT OF INTEREST CLAIM RAISED BY EMPLOYEE DENIED DISABILITY BENEFITS

Mega-hotelier **Marriott International Inc**. and its disability insurer were successful last month in defending itself against a challenge by a former employee seeking long-term disability benefits in spite of the conflict of interest presented by their decision. The **United States District Court for the District of Maryland** ruled that the Bethesda-based company supported its decision with ample evidence.

"In sum, the evidence supports [**Liberty Life Assurance Company of Boston**'s] discretionary decision that [**Robert Briggs**] did not provide sufficient evidence of a disability under the Policy. While Liberty has a conflict of interest, based on the reasons articulated above, this Court concludes that Liberty's decision was nevertheless 'consistent with an exercise of discretion by an [administrator] acting free of the interests that conflict with those of the beneficiaries,'" the court concluded in the published opinion.

Briggs worked for Marriott for 20 years. At the time of the litigation, he was a Senior Information Systems Analyst. As an SIS Analyst, Briggs maintained and developed a computer system that served the worldwide reservation center for Marriott. Although his job included various tasks, Briggs' main duties were to sit at a computer terminal and enter program data continuously for about four hours without a break.

Continued on page 3

Noland asked the **Circuit Court for Anne Arundel County** to review the decision. The trial court reversed and remanded the case for further consideration. The court's decision was based upon its view that the final administrative decision gave insufficient consideration to the mitigating factors found in *Delambo*.

Appellate Court Decision

The **Court of Special Appeals** affirmed in an unreported opinion. The state's intermediate appellate court held that "one sentence stating that appropriate consideration was given to [the factors delineated in *Delambo*] is not adequate to permit meaningful judicial review." The appellate court explained that, while it may be unwarranted for a physician or paramedic to strike a patient, that does not mean that the force is always excessive, especially where that individual is acting in self-defense.

In arguing its case before the appellate court, MAA relied on *MTA v. King*, 369 Md. 274 (2002). In *King*, the court held that judicial review of an adjudicatory administrative decision disciplining a state governmental employee for misconduct, where the sanction imposed was lawful and authorized, does not encompass review to determine whether the sanction was "disproportionate to the offense" or "disproportionate to the employee's misconduct" unless the disproportionality or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary and capricious. In Noland's case, the appellate court distinguished the two by explaining that Noland's case was not one in which an individual claimed that his or her punishment was disproportionate to that of others who committed the same act.

But, when the case came before the state's highest court, the Court of Appeals overturned *Delambo* and rejected the appellate court's "narrow interpretation" of *King*.

Delambo Overturned

A court's role in reviewing an administrative agency's decision is narrow. It 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. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59 (1999). In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. *Bulluck v. Pelham Wood Apts*., 283 Md. 505 (1978).

In the case at bar, the Court of Special Appeals indicated that that the principles set forth in *MTA v. King* and its progeny applied only to "a case in which an individual claims that his or her punishment was disproportional to that of others who committed the same act." The Court of Appeals disagreed.

"The Court of Special Appeals' narrow interpretation of *King* and other Court of Appeals' cases is erroneous. No language in *King* or any other Court of Appeals' opinion suggests such a limitation. On the contrary, the *King* opinion stated that judicial review does not include review to determine whether a sanction was 'disproportionate to the offense' or 'disproportionate to [the employee's] misconduct,'" the court declared last month.

The state's high court also pointed out that the appellate court erred in its interpretation of *Maryland State Retirement Agency v. Delambo* and the present case by imposing upon Executive Branch administrative agencies numerous non-statutory requirements in employee disciplinary cases. The requirements imposed upon administrative agencies in the *Delambo* opinion, i.e., that in employee disciplinary cases the agencies make findings of fact showing that consideration was given to various enumerated factors, showing that alternative sanctions were considered and explaining why the punishment fit the misconduct had no support in the Maryland Administrative Procedure Act or in Maryland administrative law generally, the court said.

It is true, the court continued, that administrative agencies in adjudicatory cases are required to make findings of fact with respect to factual matters; however, the court said, no statutory provision or Court of Appeals administrative law opinion had been called to its attention that required that the imposition of a lawful and authorized sanction, within the discretion of the administrative agency, be justified by findings of fact.

More recently, in *Spencer v. Board of Pharmacy*, 380 Md. 515 (2004), the court explained that judicial review of a lawful and authorized administrative disciplinary decision or sanction, ordinarily within the discretion of the administrative agency, is more limited than judicial review of either factual or legal conclusions.

"In sum, when the discretionary sanction imposed upon an employee by an adjudicatory administrative agency is lawful and authorized, the agency need not justify its exercise of discretion by findings of fact or reasons articulating why the agency decided upon the particular discipline. A reviewing court is not authorized to overturn a lawful and authorized sanction unless the "disproportionality [of the sanction] or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary or capricious," Judge Eldridge wrote.

Thus, the court reversed the Court of Special Appeals' and circuit court's decision and affirmed the administrative decision.

Maryland Aviation Administration v. Clifton F. Noland, Court of Appeals, No. 15, May 10, Judge Eldridge.

continued from page 1

Briggs' history of lower back and leg pain began in 1989. He applied for disability benefits in 2002, after several surgeries. When his benefits were cut off after one year, he applied for short term disability benefits.

Briggs' supervisor indicated that the physical requirements of a SIS analyst included four and one-half hours of sitting, one hour of standing and one hour of walking. He also indicated that, although Briggs exhibited signs that his physical condition was deteriorating, Marriott needed a person to perform the job on a full-time basis and that Briggs had been provided a "zero gravity" ergonomic chair to assist him at work.

Under the long-term disability policy issued by Liberty, the company scheduled a Functional Capacity Evaluation (FCE) and conducted a videotaped surveillance on Briggs for several weeks to get an idea of his functional capacity. Investigators observed Briggs walking with and without a cane, entering and exiting his vehicle, driving with a child in the vehicle, carrying various items including a trash bag, opening the hood of his car and checking the oil in his car.

Thereafter, Liberty denied Briggs' claim for long term disability benefits on several occasions. In its last denial, Liberty concluded that, under the policy, Briggs did not meet the definition of disability and, therefore, was ineligible to receive disability benefits. Liberty relied on the following factors: (1) medical documentation from Briggs' treating providers; (2) the surveillance; (3) an IME of Briggs. Liberty also found it significant that, while one of Briggs' doctors received a copy of the IME for review and comment, the doctor did not comment on Briggs' functional capacity. As a result, Liberty decided that Briggs was capable of performing the duties of his job.

Liberty also provided Briggs an opportunity to submit any additional medical information to support his claim, which Briggs failed to do.

Briggs filed suit in the **Circuit Court for Montgomery County** alleging that Liberty's denial of his long term benefits was a breach of contract and a breach of federal ERISA law. The case was removed to federal court because of the ERISA claim

Standard of Review

In determining the standard of review for a denial of benefits under ERISA, a court must first decide whether the language of the plan grants the administrator discretion to determine the claimant's eligibility for benefits. *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264 (4th Cir. 2002).

Because Briggs conceded that the policy gives Liberty discretionary authority to make eligibility determinations, the abuse of discretion standard was triggered. If the plan confers discretion, the court reviews the decision to deny benefits for abuse of discretion. *Feder v. Paul Revere Life Ins. Co*., 228 F.3d 518 (4th Cir. 2000). Under this deferential standard, the administrator or fiduciary's decision will not be disturbed if it is reasonable, even if the court would have come to a different conclusion independently. *Brogan v. Holland*, 105 F.3d 158 (4th Cir. 1997). Such a decision is reasonable if it is "the result of a deliberate, principled reasoning process and if it is supported by substantial evidence." *Id*.

Briggs contended that Liberty, acting as both the decision-maker and insurer of the policy, had a conflict of interest when it denied him benefits. Briggs alleged that the conflict stemmed from the fact that the disability payments would be made by Liberty; as a result, the decision to deny benefits had a direct financial effect on the profitability of the company.

The Fourth Circuit has recognized that where "a benefit plan gives discretion to an administrator or fiduciary that is operating under a conflict of interest, that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.'" *Elliot*. The court responded that Briggs was correct, that because Liberty was both the policy's decision maker and insurer, the abuse of discretion standard had to be modified to reflect the potential conflict of interest.

Reasonable Denial

The court said that Liberty's decision was clearly based on a deliberate and principled reasoning process. The claim file that formed the basis for Liberty's decision contained over 500 pages of medical records, questionnaires filled out by various physicians, questionnaires completed by Briggs and other miscellaneous records. Liberty spent over a year collecting medical reports from Briggs' health care providers and conducted a videotaped surveillance to clarify Briggs' functional capacity. Liberty sought an FCE of Briggs but was unable to do so because of the objections raised by Briggs' treating physician. Liberty also commissioned an IME and sent the results to Briggs' primary physician for review and comment, the court said. And, when Briggs' primary physician questioned the conclusions made in the IME, Liberty, on its own initiative reconsidered its initial denial of Briggs' claim, the court said.

In addition, the court continued, Liberty's decision was based on substantial evidence. A vocational analysis was conducted and the conclusion was that because there is no lifting requirement for a SIS Analyst; it is a sedentary occupation and one that Briggs could perform.

Liberty also relied upon the medical judgments of an independent medical examiner and an outside board-certified peer reviewer. The peer reviewer concluded that with work modifications at his work station, Briggs could perform as an SIS Analyst.

The court rejected Briggs argument that the three physicians who treated him had arrived at different conclusions, explaining that none of them provided objective evidence that Briggs' physical condition precluded him from performing sedentary duties.

"Even considering the facts in the light most favorable to Briggs, this case amounts to Briggs' treating physicians and the non-treating physicians having conflicting clinical findings. Although Liberty cannot arbitrarily ignore the opinions of Briggs' treating physicians, it reasonably may choose to value the opinions of its own medical consultants over his treating physician," the court said. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003).

Robert Briggs v. Marriott International, Inc., United States District Court for the District of Maryland, CA No. AW-04-3427, May 6, Published.

LACK OF BURDEN-SHIFTING JURY INSTRUCTION NOT FATAL TO CAREGIVER'S CLAIM AGAINST EMPLOYER

A Maryland caregiver was not prejudiced by the court's refusal to give an instruction on shifting the burden of proof during the trial in which she challenged her employer's non-payment of overtime compensation, the **Court of Special Appeals** has ruled in an unreported opinion.

"From our examination of the cases interpreting [Fair Labor Standards Act], we are persuaded that [**Eva Marie Brown**] was not unfairly prejudiced by the trial court's refusal to give a 'burden shifting' instruction. Nor was [she] unfairly prejudiced by the jury instructions that were actually given, which permitted – but did not compel – an inference that there were occasions on which [Brown] had actually worked longer than a 10 hour day," the court said.

Brown worked for **SecureCare Services Ltd**. from 2000 to 2002 as an onsite care giver. During her employment with the company, she lived at one of the facilities and received a "flat daily rate" and was provided with room and board. SecureCare owns and operates facilities in Maryland that provide residential care to mentally retarded and other similarly disabled persons.

Brown and SecureCare disputed whether Brown was paid on an hourly basis or a daily basis. Brown contended that she was entitled to $6.50 an hour for a 10-hour work day. SecureCare contended that she was to be paid $65 a day regardless of the number of hours she worked. Brown said that her pay was later increased to $70 a day. Neither Brown nor SecureCare kept records of the number of hours that Brown actually worked.

Brown filed suit in the **Circuit Court for Montgomery County** claiming that she was owed compensation for overtime under the FLSA, the Maryland Wage and Hour Law and the Maryland Wage and Payment and Collection Act. The jury decided in SecureCare's favor. Brown's claim against **Jacinth Faith Joyner**, SecureCare's president, was dismissed on the ground that she was not an employer under the FLSA. Brown did not make a claim against Joyner under either the Maryland Wage and Hour Law or the Maryland Wage Payment and Collection Act.

The state's intermediate appellate court affirmed the lower court's judgment against her.

Appellate Reasoning

The FLSA generally provides that employees who are not exempt from the statute and who work more than 40 hours in any given week are entitled to be compensated for such overtime hours. 29 U.S.C. §207(a)(1). In an action to recover unpaid minimum wages and overtime compensation due under the FLSA, the plaintiff has the burden of proving by a preponderance of the evidence the number of hours worked and the amount of wages due. *Johnson v. Blankenship*, 152 F.2d 99 (8th Cir. 1946).

Relying on *Anderson v. Mt. Clemens Pottery Company*, 328 U.S. 680 (1946), Brown contended that, once she proved that the activities she claimed constituted compensable work, she must then only prove the number of hours she worked by a "just and reasonable inference." *Id*. In *Mt. Clemens*, the **United States Supreme Court** established the framework for allocating burdens of proof in cases brought under the FLSA for unpaid wages and overtime compensation in which the employer's records are inaccurate and the employee cannot offer convincing substitutes. In such instances, the court said it would hold that an employee has carried his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Maryland's intermediate appellate court said that Brown's reliance on the case was misplaced because of a fundamental difference between work performed by employees who "live-in" and work performed by employees who live outside the workplace. An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered to be working all the time he is on the premises. Determining the exact hours worked under those circumstances is difficult and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. 29 C.F.R. §785.23.

In addition, In *Myers v. Baltimore County, Maryland*, 2002 WL 31236296 (4th Cir. Oct. 7, 2002), *cert. denied*, 123 S.Ct. 1755 (2003), the court held that 29 C.F.R. 795.23 establishes a presumption that an employee who lives on the premises is not always working.

The *Brown* court also pointed that another unreported opinion of the Fourth Circuit, *Talton v. I.H. Caffey Distributing Co., Inc*., 2005 WL 91625 (4th Cir. Jan. 18, 2005), recently interpreted *Mt. Clemens* to require that, in establishing a claim for unpaid overtime wages, an employee must prove by a preponderance of evidence the "amount and extent" of the work "as a matter of just and reasonable inference." Addressing the applicable burden of persuasion, the *Talton* court specifically held that "to establish a claim for unpaid overtime wages, the employee must establish by a preponderance of evidence (1) that he or she worked overtime hours without compensation, (2) the amount and extent of the work as a matter of just and reasonable inference and (3) that the employer knew of the compensated overtime.

The *Brown* court said that its examination of the cases interpreting the FLSA persuaded it that Brown was not unfairly prejudiced by the trial court's refusal to give a "burden shifting" instruction. Nor was Brown unfairly prejudiced by the jury instructions that were actually given, which permitted but did not compel an inference that there were occasions on which she had actually worked longer than a 10-hour day.

Eva Marie Brown v. SecureCare Services, Ltd., Court of Special Appeals, No. 1097, May 11, Unreported, Judge Murphy.

FORMULAIC VOLUNTEER EARLY RETIREMENT PROGRAM LACKS ADMINISTRATIVE SCHEME NECESSARY FOR ERISA TO APPLY

A Baltimore City college's volunteer early retirement program does not qualify as an employee benefit plan under ERISA because it is not an "ongoing administrative scheme," the **United States District Court for the District of Maryland** ruled last month in a published opinion.

"In short, [**Loyola College**] has failed to demonstrate that the [Volunteer Early Retirement Program] necessitated an 'ongoing administrative scheme' that required the kind of 'discretionary determination . . . that triggers an employer's fiduciary obligation to its beneficiaries . . . . Accordingly, the VERP was not 'employee welfare benefit plan' within the meaning of ERISA. As a result, this court lacks subject matter over the plaintiff's claim, and this case must be remanded to the **Circuit Court for Baltimore City**," **Judge Catherine C. Blake** wrote.

Request Denied

Gisele Child-Olmsted was a tenured professor at Loyola in 2001. She was 54 years old and had been employed by the college for 18 years. She began an approved sabbatical that same year. At the time, Loyola had an early retirement program that allowed tenured faculty to retire before 65. Early retirees received an early retirement severance payment upon termination of tenured employment. The payment could be received in several ways including 24 semi-monthly installment payments, 48 semi-monthly installment payments, a lump sum deposit into the participant's annuity plan or as a lump sum payment.

The faculty handbook specified that eligible faculty should provide written notice to their chairperson and to the appropriate dean by Oct. 1 of their planned last academic year of employment and that exceptions to the Oct. 1 deadline would be considered on the basis of extraordinary circumstances. The handbook stated that final approval rested with the vice president of academic affairs and listed several factors that could justify denial, all relating to the impact of early retirement of the faculty member upon the college. The college also reserved the right to amend or terminate the program in part or in full at any time.

While on sabbatical on Nov. 14, 2001, Child-Olmsted learned that termination of the program was going to be considered. The next day, she notified Human Resources that she wished to take early retirement and applied for early termination. She met with the college's vice president for academic affairs on Dec. 10, 2001. She was told that the program had ended five days earlier and that, as a result, her application was not timely.

She then filed suit in circuit court for breach of contract. The college had the case removed to federal trial court on the basis that the issue was covered by ERISA. Child-Olmsted responded, arguing that the early retirement benefit plan was not an "employee welfare benefit plan" covered by ERISA, and therefore there was no basis for federal jurisdiction.

Court Reasoning

In limited circumstances, a state common law complaint, can "convert" into one stating a federal claim, if it "is necessarily federal in character by virtue of the clearly manifested intent of Congress." *Metropolitan Life Ins. Co. v. General Motors Corp*., 481 U.S. 58 (1987). Courts have recognized that claims involving employee welfare benefit or retirement plans may present such a situation due to the exclusive preemption provision contained in ERISA. *Id*. Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. *Kulinski v. Medtronic Bio-Medics, Inc*., 21 F.3d 254 (8th Cir. 1994). State laws encompass not only statutes but also common law causes of action, such as a claim for breach of contract. *Gresham v. Lumberman's Mutual Casualty Co*., 2005 WL 844728 (see *Maryland Employment Law Reporter* May 2005).

The **United States Supreme Court** has noted the important distinction between "employee benefits" and "employee benefit plans," observing that Congress meant to preempt only the latter. *Fort Halifax v. Coyne*, 482 U.S. 1 (1987). In providing that ERISA would preempt state laws related to employee benefit plans, Congress' intent was to "establish a uniform administrative scheme" so that employers operating in more than one state would not be subject to conflicting regulations. *Id*.

In *Fort Halifax*, while reviewing whether a Maine law that required employers to provide a one-time severance payment to employees in the event of a plant closing was preempted by ERISA, the Supreme Court outlined a number of factors that indicate whether an employee benefit constitutes and ERISA plan. First, the High Court reasoned that the Congressional concerns reflected in ERISA only arise "with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." *Id*. The court determined that the Maine statute's "requirement of a one-time, lump sum payment triggered by the focus of ERISA is on the administrative integrity of benefit plans – which presumes that some type of administrative activity is taking place. *Id*.

Child-Olmsted argued that no ongoing administrative scheme existed to administer the VERP. She contended that participant eligibility

Continued on page 6

FORMULAIC VOLUNTEER EARLY RETIREMENT PROGRAM *continued from page 5*

was "determined in a purely mechanical manner," because the VERP description provided that "all regular, tenured, faculty members whose age plus years of service added together are equal to or greater than the sum of 70 are eligible to participate."

She also argued that approval of a faculty member's application was "virtually automatic," explaining that the college had never denied an eligible faculty member's request for early retirement under the VERP.

She contended that little or no employer discretion was exercised in determining the amount to pay because the VERP provided a formula based on employee salary and years of service to calculate the benefits. Once the final sum was calculated by the formula, the college would simply execute the payment according to the retiree's wishes. Therefore, she argued, the college did not undertake any long-term obligations with respect to payments that would create "periodic demands on its assets that require financial coordination and control. "

The college disputed her characterization as an oversimplified view of the VERP. The educational institution argued that the VERP required the vice president of academic affairs to exercise considerable discretion in that there were several factors that might justify denial of a faculty member's request for early retirement. The college also argued that because the VERP provided that a participant could elect to have monies dispersed under several methods that such options required "a greater need for administration of the plan." Finally, the college contended that Supreme Court and Fourth Circuit cases have stated that employee severance benefit plans can be employee welfare benefit plans covered by ERISA. *Fort Halifax, Massachusetts v. Morash*, 490 U.S.107 (1989); *Holland v. Burlington Indus. Inc., 772 F.2d 1440 (4th Cir. 1985); Biggers v. Wittek Ind., Inc.*, 4 F.3d 291 (4th Cir. 1993).

Judge Blake concluded that the college's early retirement program did not create an "ongoing administrative scheme" that required it to exercise discretion in such a way that the program would be considered an ERISA plan. *Tinoco v. Marine Chartering Co.*, 311 F.3d 617 (5th Cir. 2002).

The court started its analysis by declaring that the cases cited by the university were not "readily applicable to the facts presented in this case." The court said that the severance plan offered by the college was a strictly voluntary early retirement program, thus making it more like the plans the Supreme Court noted would likely be outside the scope of ERISA.

"Indeed, the VERP appears to more closely resemble the severance pay plans deemed not covered by ERISA in cases in other circuits," Judge Blake observed. The court said that little discretion was exercised in reviewing each applicant for approval as approval was "virtually automatic." "A minimal exercise of discretion does not convert an early retirement plan into an employee welfare benefit plan under ERISA," the court wrote.

The court also rejected the university's argument that the four payout options created an ongoing administrative scheme, explaining that courts have recognized that severance benefits providing for installment payments over an extended period of time need not trigger ERISA obligations.

Gisele A. Child-Olmsted v. Loyola College, United States District Court for the District of Maryland, CA No. CCB-04-3559, April 28, Published, Judge Blake.

Editor's Note: See *James W. Emery v. Bay Capital Corporation* in *Maryland Employment Law Reporter* March 2005 for a similar discussion.

GOVERNOR VETOES FAIR SHARE HEALTH CARE ACT

Gov. Robert Ehrlich has vetoed the bill that would have forced Maryland employers with more than 10,000 employees to spend at least eight percent of their payroll on health benefits or pay the difference to a state fund. Nonprofit organizations of the same size would have been required to spend at least six percent of their payroll on health care costs.

In a written statement, Ehrlich said that, Senate Bill 790 is "bad policy" because it imposes an arbitrary number on employers and establishes that the state would "dictate" to employers the type and level of health care benefits they must provide. "Maryland, or any state, should not be in the 'business' of micromanaging an employer's payroll," Ehrlich declared.

According to the **Department of Labor, Licensing and Regulation**, only three employers — **Giant Food**, **Wal-Mart** and the **Johns Hopkins University** – employ more than 10,000 employees.

Ehrlich also said that effort by employers who already provide health care benefits go unrecognized under the legislation. Ehrlich explained that one company affected by the legislation testified at a hearing that it did not spend eight percent of its payroll on its benefits package, yet its benefit package was dubbed "very generous" by the governor.

The **Maryland Chamber of Commerce** opposed the bill, contending that it imposes arbitrary health expenditure standards on large employers even though they already provide health insurance to their employees and that the bill would lead to demands to extend the payroll tax to all of the state's employers.

NOTICE REQUIRED IN LGTCA CASES CAN NOT BE ELIMINATED BY CLAIMING THAT EMPLOYEE ACTED OUTSIDE SCOPE OF EMPLOYMENT

The notice required under the Local Government Tort Claims Act (LGTCA) can not be eliminated by alleging that a government employee acted outside the scope of employment, the **Court of Special Appeals** has ruled in a reported opinion.

"[T]he notice requirement cannot be circumvented simply by alleging that the employee was acting outside the scope of employment when committing the tort for which unliquidated damages are claimed. To permit the notice requirement to be circumvented in that fashion would violate one of the purposes of the LGTCA by depriving the local government of the opportunity for a relatively contemporaneous investigation," **Judge Rodowsky** wrote.

The ruling stemmed from a woman's allegations that she was assaulted and stalked by an employee of the **Baltimore City Police Department** (BCPD). **Rita Chapelle**, an employee of the **Police Athletic League**, filed a complaint in the **Circuit Court for Baltimore City** on May 23, 2002 against **Osbourn McCharter** and BCPD claiming, among other things, intentional infliction of emotional distress and invasion of privacy. In the complaint, she said that she had substantially complied with the requirements of the LGTCA "in that the office of the City Solicitor was on notice of [her] claim as early as March 24, 2000 (the date of her workers' compensation claim)." The trial court granted McCharter's motion to dismiss or for summary judgment.

At oral arguments before the appeals court, the litigants focused on whether Chappelle had given the notice required by the LGTCA. C.J. §5-304. In general, an action for unliquidated damages may not be brought against a local government or its employees unless notice of the claim required is given within 180 days after the injury in person or by certified mail.

An investigator supervisor in the City of Baltimore's Law Department conducted a search in November 2003 and testified that he was unable to find any evidence that Chappelle, filed any notice of claim with the City Solicitor of Baltimore.

Chappelle argued in her brief that the trial court erred by ruling that her claims were allegations against McCarter in his official capacity. Chappelle said she sued McCarter in his individual capacity because the allegations against him were based upon actions that were not within the scope of his official duties.

The court replied that the notice requirement is not limited to actions in which the employee was acting within the scope of employment, although the local government's obligation to indemnify is so limited.

Further, the court explained, the requirement cannot be circumvented by claiming that the employee acted outside the scope of his employment. To permit the notice requirement to be circumvented in such a situation would deprive the local government of the opportunity for a "relatively contemporaneous investigation," the court said.

Chappelle v. McCarter, Court of Special Appeals, No. 0411, May 3, Reported, Judge Rodowsky.

GOVERNOR VETOES BILL TO INCREASE MINIMUM WAGE

Gov. Robert Ehrlich has given a "thumbs down" to attempts to raise the state's minimum wage by $1 an hour. Ehrlich vetoed House Bill 391 late last month. The governor said in a written statement that raising the minimum wage would place the state at a competitive disadvantage with surrounding states such as Pennsylvania, Virginia and West Virginia because they follow the lower federal minimum wage. He also said that raising the hourly wage would most hurt the people it claimed to help – the least skilled and the least educated in the workforce.

Maryland's current wage of $5.15 an hour is the same as that established by federal law. However, the Fair Labor Standards Act, the law that sets the minimum wage, allows states to create a higher minimum. About 14 states including New York, Delaware and the District of Columbia have minimum wage rates that are higher than the federal minimum wage rate

The state's **Chamber of Commerce** fought to defeat the bill, arguing that wages should be set by the marketplace, not by state government.

OFFICER'S FAILURE TO RAISE ARGUMENTS BEFORE HEARING BOARD FORBIDS USE OF THE ARGUMENTS DURING JUDICIAL REVIEW

The failure to raise arguments during administrative proceedings torpedoed a former law enforcement officer's quest to overturn his firing by the **Town of Cheverly**. In an unpublished opinion, the **Court of Special Appeals** last month upheld a lower court decision affirming **Derek L. Day**'s termination.

"As the Town correctly points out, Day's argument, that the Hearing Board had no authority to decide the charges brought against him because he was not a law enforcement officer at the time, was raised for the first time in the Circuit Court. In addition, our review of the entire administrative record discloses that Day's second argument, that he could not be tried on charges that he violated Chapter 21 of the Town Code, was also raised for the first time before the Circuit Court. Since Day did not raise those issues before the Hearing Board, he may not raise them in a judicial review action," **Judge Eldridge** wrote.

In March 1999, Day applied for a job as a law enforcement officer with the Town of Cheverly (Town) after having worked for the **University of Maryland at Baltimore Police Department** (University) for 19 years. According to the court's opinion, the police officer who performed a background check on Day swore that she had performed all of the checks when she had not. She had not spoken with Day's supervisor or reviewed his record. Day went to work for Cheverly in April 1999. Sometime thereafter Cheverly's police chief learned that Day "was under charges for insubordination" and was not in good standing with the University's police department.

In addition, because Day had accumulated significant sick leave while working for the University and wanted to use his sick leave, while working for Cheverly, he called in sick to the University 49 times. He officially resigned from the University after exhausting his sick leave. The court noted that, as a result, he received a salary from the University while also drawing a salary from the Town's police department. The court also noted that Day did not request permission to work at a secondary employment, which is required by the rules of both the Town's and the University's police departments.

After Day resigned from the University, the chief of that department reported that Day was not in good standing because of insubordination charges and the improper use of sick leave. He also returned Day's certification card to the **Police Training Commission** as required by COMAR 12.04.01.06(d)(5). After receiving the information, the Commission asked Cheverly's **Chief Jones** why his department had certified that Day was in good standing with his previous employer. Upon reviewing Day's file, it became apparent that a full background check had not been performed and Jones complied with the Commission's demand that Day's certification card be returned.

The Town then fired Day, insisting that he was a probationary employee and, as such, was not entitled to the protections offered by LEOBOR. (See *Maryland Employment Law Reporter* May 2005 for a discussion of this argument in *Mohan v. Norris*). Day successfully sought injunctive relief from the **Circuit Court for Prince George's County**. The trial court ordered the Town to comply with LEOBOR in further disciplinary proceedings.

The Town appealed, arguing that Day was not a police officer because he did not have a certification card issued by the Commission. The Court of Special Appeals affirmed the trial court's holding, pointing out that Day had a card at the start of the proceedings.

The Town then filed 40 charges against Day, including conduct unbecoming a police officer and unauthorized secondary employment. A Hearing Board convened under the auspices of LEOBOR found Day guilty of 24 of the 40 charges and recommended termination of his employment. Day asked the trial court in Prince George's County to review the decision. The trial court affirmed the decision and last month, in an unreported opinion, the appeals court affirmed the trial court.

Arguments Not Raised in Administrative Hearing

The intermediate appellate court's decision against Day stemmed from his not raising arguments before the Hearing Board. Day's major argument was that the Hearing Board had no authority to decide the charges brought against him because he was not a law enforcement officer. On appeal, he relied on an exchange from the transcript of the administrative proceedings to support his point.

It is a long-established rule that a court reviewing an adjudicatory decision of an administrative agency may not pass upon issues presented to it for the first time on judicial review. *Department of Health and Mental Hygiene v. Campbell*, 364 Md. 108 (2001).

The appellate court rejected the argument, observing that it was impossible to interpret any part of the exchange as an argument by Day that he was not a law enforcement officer. In fact, the court said, Day's counsel took the opposite position, namely that Day was a police officer for LEOBOR purposes.

Continued on page 10

FREDERICK COUNTY EXECS CAN'T USE PUBLIC OFFICIAL IMMUNITY IN DEFENDING THEMSELVES IN LAWSUIT

Several executives with Frederick County will not be able to take advantage of "public official immunity" in defending themselves in a negligence action brought by the parents of a girl injured in a sledding accident, the **Court of Appeals** ruled last month.

"Accordingly, we conclude, on the state of this record, that [the individuals employed by Frederick County] are not 'public officials' and may not assert as a defense common law public official immunity," **Judge Harrell** wrote.

The litigation began when **Isabel de la Puente** and **Mark Willoughby** filed suit in the **Circuit Court for Frederick County** against several workers employed by the county after their daughter, Amelia, was involved in a sledding accident at **Pinecliff Park** in Frederick, Maryland. In 1999, while sledding with her father, the girl's toboggan veered off the slope and collided with a tree. She suffered significant physical injuries.

In court documents, the parents claimed simple negligence on the part of seven individuals (the defendants) employed in various capacities by the **Frederick County Department of Parks and Recreation**. Amelia's parents contended that the defendants – Director of Parks, Capital Improvement Administrator, Recreation Superintendent, Park Superintendent and Safety Inspector — were mere government employees and not entitled to assert the defense of public official immunity. However, the trial court disagreed, granting the defendants' motion, finding that they had exercised "some portion of the sovereign power of the state" and that they were performing discretionary rather than ministerial acts.

The Court of Appeals decided to hear the case before arguments could be heard in the state's intermediate appellate court. The state's highest court reversed the trial court and remanded the case.

Public Official Immunity

A government actor will enjoy qualified immunity from liability for his or her "non-malicious acts" where (1) he is a public official rather than a mere government employee or agent; and (2) his tortious conduct occurred while he was performing discretionary, as opposed to ministerial, acts in furtherance of his official duties. *Muthukumarana v. Montgomery County*, 370 Md. 447 (2002).

In *James v. Prince George's County*, 288 Md. 315 (1980), the court established four guidelines to aid in the analysis of whether a particular individual is a public official for purposes of common law immunity:

(1) whether the position was created by law and involves continuing and not occasional duties;
(2) whether the holder performs an important public duty;
(3) whether the position calls for the exercise of some portion of the sovereign power of the state; and
(4) whether the position has a definite term for which a commission is issued and a bond or oath are required.

The guidelines do not carry equal weight and are not exclusive, the court explained. Even if an individual's position does not satisfy the guidelines, that individual may be considered a public official if he or she exercises "a large portion of the sovereign powers of the government" or "can be called on to exercise police powers as a conservator of the peace." *Duncan v. Koustenis*, 260 Md. 98 (1970).

In this instance, the state's highest court concluded that the defendants were not public officials. The court said that a position created by law is an office created by Constitutional or legislative enactment, such as a statute or local ordinance where an oath is generally administered and a commission issued. Duncan. "There is nothing in the present record to indicate that the positions of Director of Parks, Capital Improvement Administrator, Recreation Superintendent, Park Superintendent or Safety Inspector, respectively, were positions 'created by law,' 'have a definite term for which a commission is issued,' or 'require a bond or an oath,'" the court reasoned.

Although the participants in the lawsuit conceded that the defendants perform important public duties, there was some dispute as to whether the defendants exercised some portion of the sovereign power of the state.

The trial court found that the defendants exercised a portion of the sovereign power of the state but the Court of Appeals disagreed, pointing out that the defendants did not make park rules, regulations, or policy. Rather, the court continued, the defendants determined and adopted policies created by the county's parks and recreation commission.

The court then turned to the additional criteria and found that the defendants do not qualify as public officials because they are not called upon to exercise police powers as a conservator of the peace. For example, the court said, neither the defendants' positions or similarly held positions have been held in the past to have exercised such powers. *Livesay v. Baltimore County*, 384 Md. 1 (2004); *Williams v. Mayor of Baltimore*, 359 Md. 101 (2000).

Isabel de le Puente, et al. v. County Commissioners of Frederick County, Court of Appeals, No. 50, May 5, Judge Harrell.

OFFICER'S FAILURE TO RAISE ARGUMENTS
continued from page 9

"The argument that Day was not a law enforcement officer for purposes of the LEOBOR was clearly raised for the first time on judicial review, and is not properly before this Court," Judge Eldridge wrote in the unpublished opinion.

Similarly, the court observed, the argument that Day could not be tried on charges based on Chapter 21 of the Town Code was not made at the administrative hearing before the Hearing Board, the court observed. In fact, the court continued, during the administrative hearing, counsel for Day acknowledged that the charge of unauthorized secondary employment was based on Chapter 21 of the Town Code and that, if Day violated the secondary provisions, he could be sanctioned. As a result, the argument was not properly before the trial court or the intermediate appellate court.

The court also rejected Day's contention that he was not a law enforcement officer on the alternative ground that the argument was precluded by the law of the case doctrine. The court said it was "disingenuous" because Day successfully sought in the earlier case before the trial court confirmation of his status as a law enforcement officer entitled to the protection of the LEOBOR. "He is now bound by that decision as the law of the case," the court declared, relying on *Stavely v. State Farm Insurance Co*., 376 Md. 108 (2003).

Derek L. Day v. Town of Cheverly, Court of Special Appeals, No. 1138, April 27, Unreported, Judge Eldridge.

COURT UPHOLDS ARBITRATION AGREEMENT BECAUSE OF SELF-IMPOSED NOTICE REQUIREMENT

In an attempt to stave off litigation, many businesses have agreements to arbitrate that, in recent years, have been challenged by employees who prefer to present their complaints to a seemingly sympathetic jury. Last month, **Circuit City Stores, Inc**. was successful in defending its arbitration agreement against a former employee who claimed that the document was not supported by consideration.

"Accordingly, because [Circuit City] agreed to be bound to give appellant notice before altering the terms of the arbitration agreement, and to give [**La'tia Holloman**] notice before altering the terms of the arbitration agreement, and [Holloman] would then have had an opportunity to decline to continue her employment under [Circuit City's] new terms, we hold that their agreement was supported by consideration," **Judge Davis** wrote.

In 2001, Holloman applied for a job with the electronic retailer in Marlow Heights. Holloman agreed that any disputes arising out of her employment would be settled through arbitration. The company's Dispute Resolution Rules comprised 19 rules, the last of which — Rule 19 — formed the basis for the court's holding. In Rule 19, the retailer said that it could alter or terminate the dispute resolution agreement on March 1 of any year by giving 30 calendar days written notice to its employees. Holloman signed the agreement and went to work for the company but quit and then sued, claiming that she had been harassed by a male employee.

After she received a right to sue letter from the **EEOC**, she filed suit in the **Circuit Court for Prince George's County**. The trial court found that the arbitration agreement was supported by consideration and granted Circuit City's motion to stay the judicial proceedings and to compel arbitration. The court granted Holloman's motion to stay the arbitration proceedings pending her judicial appeal.

Restatement of Contracts Provides Example

Holloman contended that Circuit City's "ability to unilaterally terminate and modify the Agreement makes its promise to arbitrate illusory." She argued that *Cheek v. United Healthcare of the Mid-Atlantic, Inc*., 378 Md. 139 (2003), controlled. In *Cheek*, Cheek argued that his arbitration agreement with his employer was unenforceable because it was unsupported by consideration. Cheek argued that United Healthcare's reservation of the right to alter, amend, modify or revoke the policy at its sole and absolute discretion at any time with or without notice rendered United Healthcare's promise to arbitrate illusory. The **Court of Appeals** agreed with Cheek. Holloman said that the reservation of rights in *Cheek* was identical to Rule 19 of Circuit City's arbitration rules.

But, Maryland's intermediate appellate court was not persuaded. "We agree with [Circuit City], however that the notice requirement in Rule 19 materially distinguishes the present case from *Cheek*, and we hold that this arbitration agreement was supported by consideration," Judge Davis wrote. The court provided an example from Section 77 of the *Restatement (Second) of Contracts*: A promises B to act as B's agent for three years on certain terms, starting immediately; B agrees that A may so act, but reserves the power to terminate the agreement on 30 days notice. B's agreement is consideration, since he promises to continue the agency for at least 30 days.

The court also said that the cases Holloman cited did not support her argument. For example, *Penn v. Ryan's Family Steak Houses*, 269 F.3d 753 (7th Cir. 2001), was not a case in which an employer limited its power to alter arbitration rules with a notice requirement, like Rule 19 in this case.

The court also observed that Holloman's solace in *Hill v. PeopleSoft USA, Inc*., 333 F. Supp. 2d 398 (D. Md. 2004)(see *Maryland Employment Law Reporter* October 2004), was also misplaced because the agreement in *Hill* did not impose a notice requirement, which distinguished *Hill* from Holloman's circumstance.

The court concluded that the parties could proceed to arbitration unless further appeals in the case were filed.

La'Tia Holloman v. Circuit City Stores, Inc., et al., Court of Special Appeals, No. 1145, May 5, Reported, Judge Davis.

CURRENCY TRANSPORTER DEFEATS CLAIM MADE BY MAN WHO SAYS COMPANY DRIVERS AIMED A GUN AT HIM ON I-95

Western Distributing Company was successful last month in defending itself on appeal of a grant of summary judgment against a claim of *respondeat superior* and negligent hiring made by a man traveling on I-95 who alleged that two of the company's drivers, while under the influence of drugs and alcohol, threatened him and forced his vehicle off the road.

Lloyd E. Jordan filed suit against the company, one of its subsidiaries, **U.S. Armored Currency** (USAC), and two drivers, **Ronnie G. Sasser, Jr**. and **Stephen Philip Meininger**, in federal trial court alleging that the two men forced him off the road and that one of them repeatedly leaned out of the passenger window of an armored tractor trailer containing $9.9 million while aiming a shotgun at him. USAC transports U.S. currency.

In court documents, Jordan charged the company with negligent hiring, training, supervision and retention of the two men. Specifically, Jordan claimed that Western should not have hired one of the drivers because of his alleged past drug use and that it failed to conduct adequate follow-up tests to ensure that the driver was not abusing drugs while a Western employee. The two men were fired after testing positive for drug use shortly after the incident.

In an unpublished opinion, the **United States District Court for the District of Maryland** ruled against Jordan on summary judgment (see *Maryland Employment Law Reporter* July 2004). Last month, in an unpublished *per curiam* opinion, the **United States Court of Appeals for the Fourth Circuit** affirmed.

Appellate Reasoning

The district court properly dismissed Jordan's *respondeat superior* claim, the appeals court decided. Sasser and Menninger were not acting to protect the cargo entrusted to them during the incident – rather, the court said, they were motivated by personal animus. While it was true that they committed the acts while on duty, they were not attempting to advance Western's interests; indeed, their actions place the safety of the cargo entrusted to them at peril rather than protecting it, the court explained.

The appeals court also said that no genuine issue of material fact existed as to Jordan's claim of negligent hiring and supervision. The court said the "key element" in determining Western's liability was whether Sasser and Meininger's illegal conduct was foreseeable to Western. To establish foreseeability, the plaintiff must present facts showing that a person of ordinary intelligence, equipped with the knowledge of the dangerous condition should realize the danger posed by that condition. *Hemmings v. Pellam Wood Ltd. Liab. Ltd. P'ship*, 375 Md. 522 (2003).

The court said it could not conclude that Western should have foreseen Sasser and Meininger's violent conduct solely because of the positive results of Meininger's pre-employment drug screening. The court said that no evidence existed in the record that Meininger previously had been convicted of any crime related to drug use. In addition, there was no evidence that Meininger tested positive for drugs while employed by Western before the incident occurred. The court said it also noted that neither Sasser nor Meininger had a record of violent behavior and that there was no record of any co-workers or customers filing a complaint regarding the men's behavior.

The appeals court said it also agreed with the district court that proximate cause was lacking due to Jordan's failure to conclusively demonstrate that Sasser and Meininger were under the influence of drugs at the time of the incident. In order to prove a nexus between Western's alleged negligence – i.e., hiring Meininger after a positive drug screening and failing to conduct follow-up testing – and Jordan's injuries, Jordan would have to show that Meininger acted while under the influence of drugs. The appeals court said it agreed with the trial court that the fact that Meininger tested positive for drugs seven days after the incident and the fact that a jury found Meininger guilty of possessing a controlled substance at the time of the incident was insufficient to prove that he was actually under the influence of drugs during the incident.

Lloyd E. Jordan v. Western Distributing Company, United States Court of Appeals for the Fourth Circuit, No. 04-1965, May 2, Unpublished, *Per Curiam*.

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ORDER TO RECLASSIFY STATE WORKERS' POSITIONS WITHIN SCOPE OF ALJ'S AUTHORITY

An Administrative Law Judge who ordered the reclassification of two state employees' positions did not exceed his authority, the **Court of Special Appeals** has ruled in a reported opinion.

"Consequently, we concluded that the ALJ did not exceed his authority as the final decision maker in these grievances by ordering that the positions of [**Diane Myers** and **Beverly Smith**] be reclassified, and that they be granted back pay accounting from one year prior to the date their grievances were filed," **Judge Meredith** wrote, adding that such an order is within the scope of authorized remedies under State Personnel and Pensions Article §12-402.

We Seven

The lawsuit was brought by seven state employees whose jobs were switched in mid-2000 from the agency buyer to the agency procurement specialist series after the **Maryland Department of Public Safety and Correctional Services** (DPSCS) commissioned a study. Dissatisfied with the change, the seven employees filed a grievance with the DPSCS, contending that their positions "should be reclassified to Agency Procurement Specialist Supervisor retroactive to the fullest legal extent." When the matter came up before the **Office of Administrative Hearings** (OAH), the OAH found that Smith's position should be reclassified to Agency Procurement Specialist II, that Myer's position should be reclassified to Agency Procurement Specialist Supervisor and denied the grievances of the other five employees.

DPSCS filed a petition with the **Circuit Court for Baltimore County** requesting judicial review of the decision to reclassify Smith and Myers. The five employees whose jobs were not reclassified also sought judicial review of the ALJ's decision not to reclassify their positions. The trial court held that the ALJ exceeded the scope of his authority when he ordered that Smith's and Myers' positions be reclassified based upon DPSCS's contention that reclassification was not a remedy available to the ALJ under S.P.P. §12-402. The court also found that sufficient evidence existed to support the ALJ's findings that Smith's and Myers' positions should be reclassified and affirmed the ALJ's decision not to reclassify the remaining five defendants.

All seven employees appealed.

Appellate Reasoning

In an appeal from the circuit court's ruling upon a petition for judicial review of an administrative decision, the agency's decision is reviewed. *Dept. of Health v. Campbell*, 364 Md. 108 (2001). In reviewing an agency's legal conclusions, under State Government Article §10-222(h)(3)(iv), the court determines whether the agency's conclusions are affected by an error of law.

DPSCS contended that the ALJ had no authority to order reclassification; rather, the ALJ could only order a new study. DPSCS asserted that reclassification of an employee's position is not among the potential remedies expressly enumerated in S.P.P. §12-402(a) or (b).

"The fatal flaw in the DSPSC's logic is that §12-402(b)(2) expressly contemplates an award of up to one year of back pay in a reclassification grievance. If the DSPSC were correct that an ALJ has no authority to order reclassification of a grievant's position, there would be little occasion for an award of back pay in a reclassification grievance," the court explained.

The court said that it did not agree with DPSCS's contention that the phrase "restoration of the rights, pay, status, or benefits that the grievant otherwise would have had" is limited to situations in which the grievant is put back into a position previously held. Rather, it continued, the statutory scheme provides for remedies of a restitutionary nature that put the employee in the same position the employee would have enjoyed if the "contested policy, procedure, or regulation had been applied appropriately as determined by the final decision maker."

Because there was no error of law in the ALJ's order as to Smith and Myers, the circuit erred in modifying that portion of the OAH's ruling, the court concluded. The court also affirmed the circuit court's ruling regarding the other five employees, reasoning that, in order to be classified as a supervisor, they had to supervise an employee in the agency procurement specialist series.

Diane Myers, et al. v. Department of Public Safety and Correctional Services, Court of Special Appeals, No. 426, May 4, Reported, Judge Meredith.

SUPREME COURT HEARS CASE ON STATUTE OF LIMITATIONS IN INSTANCES OF CONSTRUCTIVE DISCHARGE

The **United States Supreme Court** heard arguments this past April in *Graham County Soil & Water Conservation District et al v. United States Ex Rel. Karen T. Wilson*, Docket No. 04-169. Wilson filed a Federal False Claims Act suit in 2001 claiming that her former employer had submitted false claims and alleging that she had been constructively discharged from her job in 1997. The case revolves around the issue of whether the six-year limitations period under the federal act applies or whether the three-year limitation provided by state law applies. At press time, a decision had not yet been issued. The case originated in the Fourth Circuit.

ATTENDANCE AND DISCIPLINARY RECORD FAILS CORRECTIONAL OFFICER'S BID TO RECLAIM HER JOB

A former correctional officer was unsuccessful last month in persuading the **Court of Special Appeals** to overturn her firing for insubordination. In an unreported decision, the court decided against **Latonya Partlow**, concluding that in view of her attendance and disciplinary record, her termination was supported by substantial evidence.

Partlow was fired in 2002 by the **Department of Public Safety and Correctional Services** (DPSCS) for failing to report to work as scheduled. She started working for the **Maryland Reception Diagnostic and Classification Center** (MRDCC) in 1999 as a correctional officer. On Nov. 24, 2002, one-half hour before her shift was scheduled to begin, Partlow called to tell her supervisor that she was sick and would return to work on Nov. 26. The supervisor informed her that did not have enough sick leave accumulated to get paid for the absence.

When she showed up for work, with a note from her physician stating that she was restricted from lifting any objects, she was sent home until Dec. 2. Upon her return, she was charged with insubordination and presented with a letter from the warden informing her that he was proposing her termination because the current charge for insubordination was her fourth within a one-year period.

After a hearing on the matter, the **Office of Administrative Hearings** (OAH) affirmed DPSCS's decision. The **Circuit Court for Baltimore City** affirmed the Administrative Law Judge's (ALJ) decision. Maryland's intermediate appellate court also affirmed.

Appellate Arguments

Partlow raised several arguments on appeal, none of which caused the court to rule on her behalf.

The court rejected Partlow's argument that only a *request* for leave without pay (LWOP) need be made, and that the rules, Institutional Bulletin 02-36 and 02-37, did not require that she obtain authorization for LWOP before being absent from work. **Warden Conroy** testified that under COMAR 17.04.11.24A, pre-authorization must be obtained for LWOP.

The court explained that Partlow's interpretation would lead to the "chaotic result" of requiring MRDCC's leadership to constantly struggle with making sure the required number of officers actually reported for duty as scheduled and would leave the organization with no power to discipline those employees who refused to give adequate notice of their unilateral decision to take time off.

The court also ruled that Partlow's termination was not arbitrary and capricious. Partlow contended that the ALJ erred in concluding that the DPSCS properly terminated her for failing to request LWOP on November 24, 2002. The court responded that Partlow's argument was based on two erroneous assumptions: (1) that Partlow had adequate accumulated sick leave plus annual leave to cover her initial two days off and (2) that her mere filing a request for LWOP absolved her of any charge of insubordination for taking the remaining days off without authorization.

Agency decisions are examined to determine if they are supported by substantial evidence. In doing so, the court applies a reasonableness review, i.e., whether "a reasoning mind could have reached the same factual conclusions reached by the agency on the record before it." *Bond v. Dep't of Pub. Safety and Corr. Serv.*, 161 Md. App. 112 (2005). The court said the record contained substantial evidence demonstrating that Partlow did not have sufficient sick leave to cover her absence from November 24, 2002 through December 2, 2002. Further, although Partlow filed a request for LWOP on November 26, she did not have the warden's prior approval to take LWOP. Accordingly, Partlow was required to report for duty on November 24, 2002, but failed to do so. As a result, Partlow was charged with insubordination.

The November 24, 2002 incident was not the first time that Partlow had been charged with insubordination, it was her fourth charge for insubordination within one year. In addition, Partlow's personnel file revealed she had a total of 52 sick occurrences resulting in 328 sick leave days since the start of her employment with MRDCC in 1998. As a "frequent user of sick leave," the court said Partlow should have known to give her employer adequate notice so that the employer could arrange for a substitute correctional officer to cover her shift. Under the circumstances, Partlow's failure to seek advance authorization for her LWOP constituted an act of insubordination, the court said.

At Partlow's OAH hearing, the warden testified that, after reviewing Partlow's work and disciplinary history, her "continuing problems with attendance," and her length of service, he recommended her termination. Although the DPSCS could have suspended Partlow instead of terminating her, the warden testified that that another suspension would not modify her behavior. And, when the warden called Partlow in to explain her behavior, she initially stated that her absence was due to a toothache but later recanted the statement, informing the warden that she was absent for a couple of days because she had to have a cyst removed.

The court concluded that the ALJ's decision to terminate her was reasonable and supported by substantial evidence.

Latonya Partlow v. Department of Public Safety and Correctional Services, Court of Special Appeals, No. 00383, May 11, Unreported, Judge Meredith.

EMPLOYERS ARE NOT ENTITLED TO A STAY OF A WORKERS' COMPENSATION AWARD IN INSTANCES OF JUDICIAL REVIEW

An employer or an insurer is not entitled to a stay of a workers' compensation award pending judicial review, the state's top court has ruled in a 4-3 split decision. "We affirm the intermediate appellate court and hold that the court does not have the authority to issue a stay or an injunction pending the appeal of an award of monetary benefits from the Workers' Compensation Commission," Judge Greene wrote.

The state's top court noted that the issue it faced was whether the circuit court had the authority to grant an injunction in a workers' compensation case pending an appeal of an award from the Workers' Compensation Commission.

Court Proceedings

Linda M. Hanks filed a claim with the Commission seeking benefits for an occupational disease contracted in 1990 while employed by **Gleneagles, Inc**. After several proceedings and substantial delays, Hanks was awarded $282 per week for 333 weeks from Gleneagles and $144 a week from the **Subsequent Injury Fund** (Fund**)**. Because none of the award had yet been paid and because the award accounted from April 1992, Gleneagles and the Fund were faced with obligations to Ms. Hanks of $93,906 and $34,560. Asserting the statute of limitations, they filed a petition for judicial review of the Commission's decision as well as a request for an immediate temporary restraining order and a request for stay and/or preliminary injunction, seeking to defer payment of the award until judicial review had been concluded in the **Circuit Court for Harford County.** The circuit court granted a temporary restraining order but then entered an order striking its earlier order and directing payment of the award.

In a reported opinion, the Court of Special Appeals affirmed the trial court (see *Maryland Employment Law Reporter* May 2004). "The clear social policy, as enacted by the General Assembly, is that injured workers should not be denied immediate benefits by the seeking of judicial review by opposing parties. As the Court of Appeals pointed out in *St. Paul Fire & Marine Ins. Co., v. Treadwell* . . . the legislature must have foreseen the possibility that insurers would not be able to recoup benefits paid to a claimant whose award was later vacated on appeal," the court said.

Court Reasoning

Md. Code Ann., Lab. & Empl. §9-741 provides that an appeal of an order of the **Workers' Compensation Commission** (Commission) is not a stay of an order of the Commission requiring payment of compensation or a stay of an order requiring the provision of medical treatment. In addition, Md. Rule 7-205 states that the filing of a petition does not stay the order or action of the administrative agency. "The cross references note after the Rule only cites §9-741 of the Labor and Employment Article. We think that notation is significant. The language of §9-741 of the Labor and Employment Article and the case law interpreting the 'no-stay' provision informs us that in the case of a Workers' Compensation Commission award, the court may not grant a stay under Md. Rule 7-205, because to do so is 'prohibited by law,'" Judge Greene wrote.

Gleneagles argued that despite the prohibition of a stay found in §9-741 of the Labor and Employment Article, the circuit court had the power to grant some kind of injunctive relief to Gleneagles, pending the appeal of the award to Hanks. In support of its argument, Gleneagles relied on the general equitable power of the courts and on Md. Rules 15-501, *et seq*. Gleneagles said that to obtain a temporary restraining order or a preliminary injunction, one must overcome particular obstacles such as filing a bond. Therefore, the company continued, §9-741 of the Labor and Employment Article does not prohibit the grant of injunctive relief under Md. Rules 15-501, et seq. of the Maryland Rules.

"We disagree," the court responded. The court said that while there are differences in the rules regarding obtaining a stay of an administrative decision and an injunction, in this case the result would be the same. Hanks would be deprived of her workers' compensation award pending appeal. "That is the very result the Legislature intended to avoid by enacting the 'no-stay' provision," the court said.

Gleneagles also argued that denying injunctive relief in this instance would be harsh because of the large lump sum payments ordered and because the law does not permit them to "recover back" any payments made even if they were successful on appeal. In *St. Paul Fire and Marine Insurance v. Treadwell*, 263 Md. 430 (1971), the insurer paid Treadwell the awarded compensation and then prevailed on appeal. The insurer sought to recover the amount paid. The court held that an overpayment does not permit recovery. The court said, among other things, that when the legislature enacted the "no stay" provision, it must have considered and rejected the possibility that would be made to claimants whose awards were vacated on appeal. The court also said that if it was mistaken, "the General Assembly will know how to enlighten us."

The court indicated sympathy for Gleneagles' predicament but said that it couldn't change the law for them. The court cited an earlier decided case, *Petillo v. Stein*, 184 Md. 644 (1945), in pointing out that it couldn't abandon previous jurisprudence regarding the legislative mandate that an appeal is not a stay of a Commission award.

"In view of the plain language of §9-741 of the Labor and Employment Article, and the relevant case law, it is clear that the Circuit Court does not have the authority to issue a stay or an injunction of a workers' compensation award pending an appeal," the court wrote.

Dissenting Opinion

Judges Raker, Wilner and Harrell dissented, writing that §9-741 of the Labor and Employment Articles does not prohibit a court from granting a stay of a Workers' Compensation Commission Order pending judicial review, although it severely limits the discretion of the court in doing so. The dissent explained that provisions that the filing of an appeal or action for judicial review does not act as a stay of an administrative order are common in statutes providing for administrative decision-making.

No automatic-stay provisions are also common in workers' compensation laws throughout the country, the dissent said, quoting that employers often must first make a strong showing that the employer will prevail on the merits. "The law thus permits courts to issue a stay in appropriate cases but places severe limitations on its discretion to do so," the dissent wrote. "That, I think, is, or at least ought to be, the Maryland law," Judge Wilner wrote.

Gleneagles, Inc. et al. v. Linda M. Hanks, Court of Appeals, No. 57, Judge Greene, March 11, 2005.

WORKER WHO CLAIMED DISCRIMINATION BASED ON PREGNANCY ALLOWED TO PRESENT CLAIM TO JURY

A former worker for a cosmetics distributor who claimed that she was fired because of her pregnancy will be allowed to present her claim to the jury, the **United States District Court for the District of Maryland** has ruled in an unreported opinion.

"While the burden ultimately is on the plaintiff to prove intentional discrimination, and a jury may well accept that [the company's] explanation of [the] decision-making process, there are sufficient circumstances from which a jury also could conclude that this explanation is a pretext for discrimination and that the selection of [**Laurie**] **Canavan** for dismissal was motivated by her pregnancy," the court said.

Canavan went to work for **Rita Ann Distributors** in April 2002 as a merchandiser in the company's mid-Atlantic division. Rita Ann is a nationwide distributor of cosmetics that contracts with supermarket chains to set up and replenish cosmetic displays in grocery stores. Canavan's job involved driving to 18 stores a week to set up and clean displays, order new products and process returns.

The court said that Canavan performed well on the job, receiving a performance evaluation of "exceeds position requirements" in 26 of 33 categories. In the remaining categories, she was rated as an employee who fully meets all position requirements.

In December 2002, concerned about the company's financial circumstances, Rita Ann's president sent an email to the company's manager stating that expenses needed to be cut even if that included eliminating positions and using more part-time workers.

The next month Canavan informed management that she was pregnant. Canavan was terminated several days after the revelation. However, the company chose to keep on its payroll a merchandiser who had started with the company several months after Canavan.

Canavan filed a timely complaint with the **Equal Employment Opportunity Commission** and then sued Rita Ann and Amerisource, Rita Ann's parent company, in federal trial court, alleging unlawful termination in violation of Title VII, 42 U.S.C. 2000e-2(a). Canavan sought reimbursement, an award of back pay, compensatory and punitive damages and injunctive relief.

The court denied Rita Ann's motion for summary judgment.

Temporal and Geographic Proximity

Title VII provides that an employer shall not "fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000(e)-2(a)(1). The Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000(e), extended the scope of discrimination based on sex to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. §2000e(k). Thus, a pregnancy discrimination claim is analyzed in the same manner as any other Title VII sex discrimination claim. *DeJarnette v. Corning, Inc.*, 133 F.3d 293 (4th Cir. 1998).

Canavan proceeded under the burden-shifting scheme described in *McDonnell Douglas Corp. v. Green*, 42 U.S.C. 792 (1973) because she lacked direct evidence of pregnancy discrimination. To establish a *prima facie* case of pregnancy discrimination in the context of a reduction in force, the plaintiff must show that (1) she was pregnant; (2) she was performing her job satisfactorily; (3) she was discharged or demoted, and (4) similarly situated individuals outside of her protected class were treated differently. *Trammell v. Baltimore Gas & Elec. Co.*, 279 F.Supp.2d 646 (D.Md. 2003).

The court found that Canavan had established a *prima facie* case of discrimination as she was pregnant, performing satisfactorily and, when she was fired, two other non-pregnant employees were retained.

To satisfy its burden of articulating a legitimate, non-discriminatory reason for Canavan's termination. Rita Ann proffered, among other arguments, that the company was downsizing and that the manager who was demoted and offered Canavan's territory lived closer to the area than Canavan.

In response, Canavan argued that Rita Ann's explanation for her discharge was pretextual based on the (1) temporal proximity – eight days — between her informing the company of her pregnancy and her firing; (2) that Rita Ann offered varying explanations over the course of the litigation for the firing; and (3) that there was no company policy or guideline that indicated that geographic proximity was an essential factor in hiring merchandisers.

Court Decision

In an opinion written by **Judge Catherine C. Blake**, the trial court decided that the jury should hear the case. First, the court explained that temporal proximity between a protected activity and an adverse employment action may support an inference of discrimination. *Rhoads v. FDIC*, 257 F.3d 373 (4th Cir. 2001). Second, the court noted that an employer's use of different justifications for an adverse employment action is probative of pretext. *EEOC v. Sears Roebuck and Company*, 243 F.3d 846 (4th Cir. 2001). Canavan said that Rita Ann offered a "false explanation" in its letter to the EEOC, namely that she was the least senior member of her geographic region. Canavan said this was not true because **Halcyon Meersman**, who was hired almost nine months after Canavan, was the least senior merchandiser at the time. Finally, the court said, "judging from the inconsistent answers given by company officials, there was apparently no single rule as to how close a merchandiser must live to territory stores."

Laurie Canavan v. Rita Ann Distributors, et al., United States District Court for the District of Maryland, No. CCB-03-3466, March 23, 2005, Unpublished, Judge Blake.

Case Index

Maryland Aviation Administration v. Noland 1
Robert Briggs v. Marriott International Inc. 1
Eva Marie Brown v. Secure Care Services, Ltd. 4
Gisele Child-Olmstead v. Loyola College 5
Chappelle v. McCarter 7
Derek L. Day v. Town of Cheverly 8
Isabel de la Puente v. County Commissioners of Frederick County 9
LaTia Holloman v. Circuit City Stores 10
Lloyd E. Jordan v. Western Distributing Company 11
Diane Myers v. Department of Public Safety and Correctional Services 12
Latonya Partlow v. Department of Public Safety and Correctional Services 13
Gleneagles, Inc. v. Linda Hanks 14
Canavan v. Rita Ann Distributors 15

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