

MARYLAND STATE BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
NEWSLETTER

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FROM THE CHAIR

By Peter D. Guattery

The Annual Meeting is upon us. Our program this year will feature an interactive information session on the practicalities of trying an employment case from Plaintiff and Defense perspectives. The program will feature a jury of peers who will comment on the case, critique the lawyers and provide insight on the inner workings of a jurors mind. The program will start at 9:00 AM Friday, June 12, after a breakfast meeting of the Section, which will begin at 8:00 AM. As of this writing, invitations to the breakfast meeting have been mailed to all Section members. Please join us for breakfast and what is sure to be a very information program on Friday, June 12, 2009 at the Ocean City Convention.

Just this morning, President Obama named Judge Sonia Sotomayor, of the U.S. Court of Appeals for the Second Circuit, to replace the retiring Justice Souter on the U.S. Supreme Court. Judge Sotomayor has been a federal appellate judge since 1998, and was a federal judge for the U. S. District Court Southern District of New York from 1992 through her appointment to the Court of Appeals. Prior to that time, she served as an assistant district attorney for New York County from 1979 to 1984, and she worked in private practice from 1984 to 1992.

With her long track record as a federal judge, her published opinions are numerous, and that includes decisions in the field of labor and employment law. For those with the interest and inclination, here is a sampling of her opinions in this field: *Raniola v. Brattan*, 243 F.3d 610 (2d. Cir. 2001) (retaliation and hostile work environment); *Cruz v. Coach Stores*, 202 F.3d 560 (2d Cir. 2000) (hostile work environment); and, for a dissent, *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (age discrimination). She was also joined in a concurring opinion filed in the case of *Ricci v. DiStefano*, which involved a challenge by a group of white firefighters in New Haven, CT, to the City's decision not to certify the results of a test used for promotion. The case was heard just this past month before the U.S Supreme Court.

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EDITOR'S CORNER

By Albert Palewicz

If you are reading this in Ocean City, Lucky You! Each year the Labor and Employment Law Section prints extra copies of its Summer newsletter so it can be distributed to those at the MSBA Convention, who are not (yet) Section members. Seriously, the Section is proud of its Newsletter, and the section members work diligently to keep its publication regular and to insure the articles are both well written and of current interest to those who practice, or would like to practice, in the employment law arena.

As you can see from the issue in your hands, it was prepared by attorneys of Gary M. Gilbert and Associates in Silver Spring. The drafting of the articles was coordinated by Stephanie Herrera of the firm. The Section thanks Gary and Stephanie, as well as the authors of the articles for all their work.

If you glance through just the titles of the articles, you will see they are all of current interest to anyone practicing in the employment law arena. If you peruse a couple of them, you will see they represent a straightforward, professional summary of the state of the law in various areas of current interest. Some give a report of recent decisions, others describe best practices for handling a specific area of the law, and still others contain information about sources for helpful information to anyone dealing with cases in the employment arena.

The Newsletter is published quarterly, and has existed for over 12 years. It is one of the significant benefits of belonging to the Section of Labor and Employment Law. Another benefit is exemplified by the Section's program in Ocean City this year. A significant number of Section attorneys have gone to a great deal of time and preparation to present a "jury trial" at the summer program, and provide an opportunity for those attending the session to see for themselves what happens, and then to hear from jurors (volunteers from the OC community) how they viewed the evidence presented, and what parts of it

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FROM THE CHAIR (continued)

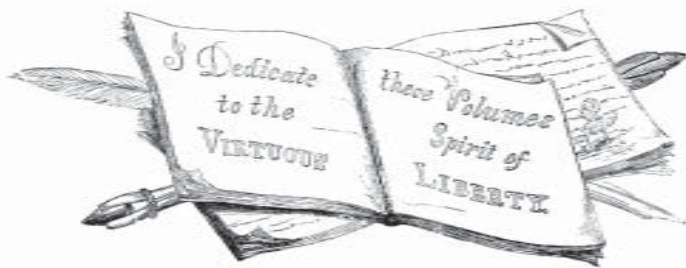
Thank you to Gary Gilbert and his firm for providing the articles for this edition of the Newsletter with their valuable insights. Enjoy the beach.

EDITOR'S CORNER (continued)

were persuasive to them, and what parts were not. The Section is also planning a MICPEL conference for early 2010. We also regularly schedule brown bag lunch meetings with various government agencies that regulate the employment law area. Most recently we have had them with the EEOC Administrative Judges, and with the Baltimore NLRB office. Both sessions were well attended and useful to those who were present. Sessions with some local area employment discrimination agencies are being planned for later this year or early in 2010.

We invite you to consider joining the Section this year when your dues renewal from MSBA arrives.

The next issue of the Newsletter will be produced by attorneys at the Baltimore firm of Smith & Downey, with Doug Desmarais as coordinator. Their ability to take on the task is particularly appreciated because they were willing to step in with very little notice, due to a scheduling problem with another group. We look forward to their work.



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

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Who Cares About Comp Damages, Worry About Front Pay

By Gary M. Gilbert

It has been nearly twenty years since enactment of the Civil Rights Act of 1991, which provided for compensatory damages in Title VII and ADA actions, albeit with a statutory cap of \$300,000 for large employers. In the intervening years, salaries and wages have more or less kept pace with inflation, but the statutory limits for damages remains unchanged. As a result, the monetary relief awarded to victims of employment discrimination has flipped from compensatory damage awards in the early years after its passage that often greatly exceeded any award for back pay to the more common result today where monetary awards for back pay often dwarf any award for compensatory damages. Add to that the potential for an award of front pay, and it becomes clear that the threat of having to pay wages is more of an incentive for employers to avoid discriminatory workplace practices than compensatory damages.

When an employee prevails in a civil rights action challenging an allegedly discriminatory discharge, courts usually structure relief to include reinstatement with back pay. After reinstatement, the employer may still be paying wages, but will at least be receiving the benefit of the previously discharged employee's work product.

But consider an employer's potential liability for front pay. Front pay, an equitable remedy available to the courts as an extension of its back pay authority, is generally awarded in limited circumstances, most often in lieu of reinstatement where (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) when the employer has a record of long-term resistance to anti-discrimination efforts. Because it is an equitable remedy, like back pay, it is not subject to the statutory caps. (Although there had been some disagreement among the appellate courts on this point, the Supreme Court put the issue to rest in *Pollard v. E.I. Du Pont De Nemours & Co.*, 121 S.Ct. 1946, 1951–52 (2001)).

An award of front pay should only be of sufficient duration to last until the employee is able to find alternative work. The length of time for front pay depends upon the facts of the particular case,

although in recent years, with an aging population, we have seen courts time and again award front pay from the date of unlawful discharge to the anticipated date of retirement. Indeed, front pay has been awarded with some frequency in recent years to discharged victims of employment discrimination, who have secured other employment but at lesser wages.

In a case that received considerable attention because it was the subject of review (and reversal but on other grounds) by the Supreme Court, the Second Circuit found reasonable a district court's award of front pay for between 9 and 12 ½ years to several victims of age discrimination. *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 79 (2d Cir. 2004), *vacated on other grounds sub nom KAPL, Inc. v. Meacham*, 544 U.S. 957, 125 S. Ct. 1731, 161 L. Ed. 2d 596 (2005). In *Meacham*, each of the four plaintiffs had secured other employment albeit at lesser wages than they were paid before an involuntary reduction in force that was found to constitute disparate impact age discrimination. The trial court concluded that the disparity in pay between their former wages and the replacement wages would likely continue for some time, possibly until retirement, and awarded front pay averaging more than ten years for each victim.

Similarly, the Third Circuit recently affirmed an award of front pay for ten years, finding the district court had not abused its discretion in finding the plaintiff was entitled to the difference in wages between what she was earning in subsequent employment and what she would otherwise have earned had she been hired into a full time position she sought (she was then discharged from her part time employment) in *Donlin v. Philips Lighting N. Am. Corp.*, 2009 U.S. App. LEXIS 8408 (3d Cir. Pa. Apr. 23, 2009). In *Donlin*, the district court sought an advisory decision on the subject of front pay from the jury (remember – equitable relief including back pay and front pay is always awarded by the court; only compensatory damages are awarded by the jury). When the jury recommended front pay for a period of 25 years, the district court reduced the award to 10 years. In a decision that nicely articulates the factors considered in determining the duration of front pay awards, the Third Circuit found the district court's action reasonable, noting that the \$101,800 in front pay was warranted under the facts and that the "standard of review (abuse of discretion) grants considerable leeway to district courts to grant an award that best serves Title VII's remedial purpose." 2009 U.S. App. LEXIS 8408. Because the period for front pay is dependent on the facts of a particular claim, practitioners must develop this aspect of the record, making discovery often critical in the effort to do so.

Although plaintiffs have not fared as well in the Fourth Circuit, the potential is obvious. For example, in *Dotson v. Pfizer*, 558 F.3d 284 (4th Cir. 2009), an FMLA retaliatory discharge, Dotson

sought some \$8 million in front pay, “including lost future earnings and benefits stretching fifteen years into the future -- until, as Dotson explained, a planned early retirement at age 58.” *Dotson*, 558 F.3d at 300. The district court refused front pay and the Fourth Circuit affirmed, both viewing the facts somewhat favorably to the defendant by concluding that the plaintiff, a pharmaceutical employee, had taken other employment and was “making approximately \$ 65,000 less than the approximately \$ 232,000 in salary and benefits he made prior to his termination. Thus, he had secured comparable, if not precisely equivalent, work at another major drug company.” *Id.* Had the court not found the difference in salary and benefits inconsequential, the defendant might have faced a substantial front pay award.

Resources Available to Practitioners and Employees to Obtain Effective Accommodations for Individuals with Mental Disabilities

By Deryn A. Sumner

Even the most inattentive manager can figure out that a disabled employee in a wheelchair will require a ramp for the front steps or that a deaf employee may require an interpreter to translate vital information in an important meeting. But many times, a disabled individual needs accommodations that are not as apparent. This is especially true with mental disabilities which may not be as obvious and require more creative solutions. But no matter the nature of the disability, every qualified individual with a disability is entitled to effective accommodation in the workplace. However, finding effective accommodations can be difficult when even the employee is unable to determine what accommodations may help and is unaware of the possibilities. In our experience, employees with mental disabilities may especially need assistance to determine how their disability impacts their work performance and how to work with management to brainstorm potential solutions to these problems. In aiding these clients, it is important both to think creatively and to use every resource possible to find the best solution.

Although practitioners in the field often step in after an employee has been denied an accommodation necessitating legal action, attorneys are sometimes called upon to assist in actually procuring a reasonable accommodation for a client. Involving an attorney in that stage of the process may yield a quicker response to the employee’s request and ensure that an employee does not provide more medical documentation to the employer than required by law. Helping to secure an accommodation for a disabled employee, which enables them to be a productive and happy employee, is also very rewarding professionally. In all cases, however, the client should be apprised that attorneys’ fees are most likely not recoverable if the employer complies with providing the accommodation, as there would be no violation of law.

Many prospective clients seeking assistance in procuring accommodations in the workplace are afraid that their request will be rejected as unreasonable and therefore are reluctant to ask for the assistance they need in the workplace. It is important to stress that it is the employer’s burden to show that a requested accommodation is an undue hardship. *See* 29 C.F.R. § § 1630.2(o) and(p), 1630.15(d); *see, e.g., Long v. Dep’t of Defense*, EEOC Appeal No. 0120071575 (April 3, 2009) (holding that the agency failed to show, by a preponderance of the evidence, that providing a full-time sign language interpreter to the complainant so he could deploy to Qatar was an undue hardship); *Cruzan v. Dep’t of Defense*, EEOC Appeal No. 0120071893 (August 15, 2008) (finding the agency did not meet its burden to show that providing an interpreter with a security clearance to accompany the complainant on a six-month deployment to Iraq was an undue hardship).¹

Further, both parties have an affirmative duty to engage in the interactive process to find effective accommodations. 29 C.F.R. § 1630.2(o)(2)(3). However, it is important to make sure an employee knows that an employee is only entitled to an effective accommodation, and not to the accommodation of his or her choice. *See, e.g., Hollock v. Soc. Sec. Admin.*, EEOC Appeal No. 01A14566 (October 31, 2002). The initial step in working with client who need reasonable accommodations in the workplace is to identify the limitations they are experiencing on a day to day basis and brainstorm a list of possible solutions to address each issue. Are they unable to show up to work on time? Do they find it hard to concentrate on their work assignments? Are they experiencing drowsiness at work, or even find themselves falling asleep at their workspaces?

Once the workplace limitations are identified, practitioners, employers, and employees should avoid narrowing the scope of possible solutions. For example, an employee who has difficulties concentrating in the workplace may benefit from a quieter workspace. This could be achieved by a variety of means.

Employers often hesitate to provide private offices to employees not otherwise entitled to them. However, cubicle walls can be extended up to the ceiling. Environmental factors about the employee's workspace can be changed. Typical gathering places where employees chat, such as the proverbial water cooler or copy machine, can be relocated. An employee can be provided with a white noise unit or noise cancelling headphones to create a quieter work environment. An employee who takes medication that causes drowsiness or otherwise impacts sleep patterns may be allowed to take rest periods during the work day or request to split the work day into two shifts to allow a long rest period. That same employee may benefit from having the work schedule shifted. Alternatively, the employee could be allowed to telecommute a few days a week. An employee who has a hard time concentrating on work assignments could request that all assignments be provided in writing with an enumerated due date. The employee could also request to be allowed to work for periods of time without interruptions from phone calls and meetings. A large wall calendar may help keep track of multiple assignments. Microsoft Outlook, used by many employers, can be used to schedule an employee's work time and has tools available to track tasks and provide reminders of due dates.

When brainstorming alone does not point the way to an effective accommodation, the Department of Labor's Office of Disability Employment Policy offers a fantastic resource for finding solutions to a range of disabilities, including many mental disabilities. The website, the Job Accommodation Network ("JAN") (found at <http://www.jan.wvu.edu/>), provides guidance for possible accommodations for a wide variety of mental disabilities, including bipolar disorder, post traumatic stress disorder, and attention deficit disorder. For example, the website suggests that such accommodations as providing written meeting minutes to an employee experiencing memory problems, allowing an employee who is easily distracted to use a white noise machine or headphones, and allowing an employee experiencing stress to take unscheduled breaks or group breaks together into a longer break, might prove effective for individuals suffering from limitations related to post traumatic stress disorder. See Kendra M. Duckworth, MS, *Accommodation and Compliance Series: Employees with Post Traumatic Stress Disorder*, Job Accommodation Network, Sept. 5, 2008, <http://www.jan.wvu.edu/media/ptsd.html>.

The JAN website also mentions specific products that could assist an employee in the workplace. One of the more interesting product recommendations is the Doze Alert™, a product designed to prevent people from falling asleep behind the wheel of a vehicle. The employee wears the device behind his or her ear and the device emits a buzzing sound when the employee's head falls forward. See Doze Alert, Job Accommodation Network, <http://www.jan.wvu.edu/>

[cgi-win/OrgQuery.exe?Sol607](http://www.jan.wvu.edu/cgi-win/OrgQuery.exe?Sol607); see also Sav-A-Life, http://www.sav-a-life.com/Doze_intro.htm. JAN recommends the device to employees suffering from sleep disorders to prevent them from falling asleep at work. Another interesting item is the CubeSmart® Cube Door. This inexpensive and retractable cubicle door creates a temporary barrier to interruptions, which could increase an easily distracted employee's concentration. See Sound Absorption Panels, Job Accommodation Network, <http://www.jan.wvu.edu/cgi-win/OrgQuery.exe?Noi47>; see also Cube Door, <http://www.cube-door.com/index.php>.

Other resources are available on the Internet for practitioners and employees looking for ideas for workplace accommodation. The EEOC has released enforcement guidance on the ADA and reasonable accommodations, including a very clearly written question and answer section. See Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and the Americans With Disabilities Act*, Oct. 17, 2002, <http://eeoc.gov/policy/docs/accommodation.html>. However, note that this guidance has not been updated since the enactment of the Americans With Disabilities Act Amendments Act of 2008 (42 U.S.C. § 12101 et seq. (2008)). Advocacy and education groups for specific disabilities can also be good resources for brainstorming accommodations. The International Dyslexia Association provides suggestions on helping adults with dyslexia in the workplace. See The International Dyslexia Association, *Adults With Dyslexia And The Workplace*, http://www.interdys.org/ewebedit-pro5/upload/Adults_with_Dyslexia_and_the_Workplace.pdf. The Learning Disabilities Association of America also offers suggested accommodations to adults with learning disabilities. See Dale S. Brown, *Job Accommodation Ideas for People with Learning Disabilities*, LEARNING DISABILITIES ASSOCIATION OF AMERICA (2005), available at <http://www.ldanatl.org/aboutld/adults/workplace/accommodation.asp>.

Another useful resource when working with clients with disabilities is the Commission's recent guidance discussing the application of performance and conduct standards to employees with disabilities. Again the Commission used an easy to understand question-and-answer approach to respond to common inquiries concerning disabled employees in the workplace. See Equal Employment Opportunity Commission, *The Americans With Disabilities Act: Applying Performance and Conduct Standards To Employees With Disabilities*, Oct. 14, 2008, <http://www.eeoc.gov/facts/performance-conduct.html>.

Additional resources to consider for practitioners, employers, and employees include medical providers, therapists, counselors and even family members. For instance, a spouse or partner may

have implemented a procedure or system in the home that helps the employee cope with the effects of his or her disability such as having a centralized calendar to help keep track of appointments and other tasks or eliminating outside distractions like television or radio to assist with concentration. These ideas may lead to effective accommodations in the workplace. In some cases, mentors, life coaches, or even professional workplace consultants and professional organizers may also be of assistance.

Although the effort to brainstorm ideas for effective accommodations is time well spent, the first set of accommodations will often go through several reiterations before ideal ones are found. Further, as needs change, accommodations may need to be altered or added. Sometimes an employee may even find they no longer need a specified accommodation. However, throughout this process, employers need to be cognizant of their obligations under the law to cooperate in finding solutions for their disabled employees. Attorneys, as the employee's advocate, also need to cooperate in providing medical documentation to support the employee's requests, and ensuring the employer's proposals are narrowly tailored to what is required by law and related to the requested accommodation. Practitioners should also promptly address an employer's failure to cooperate in providing accommodations in good faith, and be prepared to take appropriate action to protect their client's interests.

Footnote:

¹ These citations refer to cases adjudicated by the Equal Employment Opportunity Commission which, besides accepting and investigating charges of discrimination from the private sector, also holds an adjudicatory function for the federal sector.



Groups Battle Over the Inclusion of Gender-Identity in Montgomery County's Anti-Discrimination Laws

By Shannon C. Leary

Since 2001, Maryland has seen changes in its antidiscrimination laws focusing on sexual orientation and gender identity. As Christina Bolmarcich highlighted in the Spring Newsletter, Maryland joined other states in enacting legislation that protects individuals from discrimination based on gender identity. (Christina Bolmarcich, *Recent Cases Offer Employment Discrimination Protection to Transgender People*, MARYLAND STATE BAR ASSOCIATION SECTION OF LABOR AND EMPLOYMENT LAW NEWSLETTER, Spring 2009, at 10). While attempts to broaden the scope of the protection of Maryland's state laws to transgendered individuals have failed, efforts in Baltimore City were successful. S. RES. 566 (Md. 2009); H.R. RES. 474 (Md. 2009); Baltimore City, Md., Code, Art. 4, §3-1(1) (2009). In 2002, Baltimore City added transgendered individuals to those protected under the antidiscrimination laws. Baltimore City, MD., Code, Art. 4, § 3-1(1) (2009). As discussed below, Montgomery County, after a lengthy battle, is following suit.

In late 2007, Montgomery County appeared poised to join with Baltimore City in offering protection from discrimination to transgendered individuals. In November 2007, the Montgomery County Council, despite vocal opposition from dissenting groups, put to a vote Bill No. 23-07. (See Montgomery County Maryland County Council, *Councilmember Duchy Trachtenberg: Separating Fact from Fiction about Montgomery's Transgender Legislation Rights Protection Measure Scheduled for Nov. 13 Council Vote*, Nov. 2, 2007). The bill would "prohibit discrimination in housing, employment, public accommodations, cable television service, and taxicab service on the basis of gender identity." Non-Discrimination – Gender Identity, Montgomery County, Md., City Council Bill No. 23-07 (2008). An earlier draft of the bill would have allowed access to public restrooms based on a person's gender identity. (Ann E. Marimow, *Transgender Bill May be Close to Passing*, WASH. POST, Nov. 11, 2007, at C05). This prompted opponents to begin referring to the Bill as the "Bathroom Bill." (Maryland Citizens for Responsible Government, *Democracy Dealt Blow by Maryland Supreme Court*, Sep. 8, 2008). After widespread outcry over this ver-

sion of the bill, the drafters, fearing that the bill would not pass, amended the language, keeping the law silent on the issue of public restrooms. (Ann E. Marimow, *Transgender Bill May be Close to Passing*, WASH. POST, Nov. 11, 2007 at C05). On November 13, 2007, a unanimous City Council approved the Bill and on November 21, 2007, County Executive Isaiah Leggett signed the legislation, thereby broadening the scope of Montgomery County's anti-discrimination laws.

The legal battle surrounding the Bill began shortly after its passage. Opposition groups, spearheaded by Maryland Citizens for Responsible Government ("MCRG"), went to work collecting signatures for a petition to place a referendum on the November 2008 ballot. On February 20, 2008, the Board of Elections notified MCRG that 13,476 signatures were accepted as valid, but more signatures were needed to put the referendum on the ballot pursuant to the Montgomery County Charter. (*Jane Doe, et al., v. Mont. Cty. Bd. of Elections*, 962 A.2d 342, 347 (Md. 2008)). On March 6, 2008, the Board of Elections officially certified the petition. *Id.* Groups in support of the law, including Lambda Legal and Equality Maryland, began reviewing the signatures for defects, and on March 14, 2008, twelve citizens filed a complaint in Montgomery County Circuit Court, alleging that the petition had an insufficient number of valid signatures and therefore was improperly certified. (See National Gay and Lesbian Task Force, *Montgomery County Transgender Nondiscrimination Law Protected from Repeal Effort*, Sept. 9, 2008).

The Circuit Court dismissed the complaint on summary judgment in favor of the Board of Elections, explaining that the plaintiffs did not bring suit within the required 10 days under Section 6-210.¹ The Court found that the cause of action accrued on February 20, 2008, when the Board of Elections sent MCRG notification of the accepted signatures.² Plaintiffs filed an appeal.

The Maryland Court of Appeals heard oral arguments on September 8, 2008 and quickly issued a Per Curiam Order on September 9, 2008. The Court later explained in a more thorough decision that the complaint was timely, as plaintiffs were not aggrieved, and therefore the 10-day period did not start running, until the Petition was certified on March 6, 2008. This, according to the Court, was the date on which "Jane Doe [was] 'aggrieved' by a final 'determination,'" permitting plaintiffs to seek judicial review under Section 6-209. The Court went on to find that the petition did not contain sufficient valid signatures under the Maryland Code to put a referendum on the ballot. The Court held that the petition required 5% of all registered voters, not merely active voters, and that the requirements outlined in Section 6-203 were mandatory requirements and not suggestive. (*Doe*, 962 A.2d at 359-60). Accordingly, the Court of Appeals reversed the Circuit Court decision and found that

MCRG did not meet the requirements to have the referendum placed on the ballot in November 2008.

After the Court's decision in *Doe*, the MCRG challenged the ruling. Supporters of the petition filed suit against the Montgomery County Board of Elections, arguing that the Board of Elections should be estopped from decertifying the petition in accordance with the Court of Appeals ruling. While the case was pending, the Circuit Court denied the plaintiffs' request for a temporary restraining order, and although the plaintiffs appealed the decision, they voluntarily dismissed their appeal of the denial. The Board of Elections filed a Motion for Summary Judgment, and after hearing oral arguments on May 8, 2009, the court ruled in favor of the Board of Elections. (Telephone Interview with Marc P. Hensen, Deputy County Attorney, Montgomery County, MD Office of the County Attorney (conducted May 19, 2009).)

While Plaintiffs have the opportunity to appeal the grant of summary judgment, it appears as though the legal battle over Bill No. 23-07 may have come to an end. Unless Plaintiffs successfully appeal the decision, and ultimately prevail in having the referendum placed on the ballot, discrimination against individuals based on gender identity will remain illegal in Montgomery County.³

Footnotes:

¹ Section 6-210 of the Montgomery County Charter requires that parties requesting judicial review of Board of Elections decisions file their complaint within 10 days following the determination to which the suit relates.

² The circuit court also addressed the merits of the plaintiffs' claim and explained the signatures were sufficient, despite the fact that 5% of active voters, rather than registered voters, were gathered, and despite other defects, because Section 6-203 was "merely suggestive as opposed to required." *Jane Doe, et al., v. Mont. Cty. Bd. of Elections*, 962 A.2d 342, 349 (Md. 2008).

³ As of the writing of this article, the plaintiffs have not filed a notice of intent to appeal the decision. Telephone Interview with Marc P. Hensen, Deputy County Attorney, Montgomery County, MD Office of the County Attorney (conducted May 19, 2009). Maryland Rules of Civil Procedure require that notice of appeal "be filed within 30 days after entry of the judgment or order from which the appeal is taken." Md. Rules. 8-202(a).

Health Benefits of Domestic Partners of Maryland State Employees

By Benjamin E. Wick

This year the General Assembly approved Governor O'Malley's proposal to extend healthcare benefits to domestic partners of Maryland state employees.¹ Maryland is poised to provide such benefits to its employees in July 2009.² Healthcare benefits are an important and highly desirable benefit of employment. According to Equal Rights Colorado, one-third of the fifty United States already provide healthcare benefits to domestic partners of state employees.³ Notwithstanding the importance of healthcare and its widespread approval among many states, the extension of benefits to domestic partners is a contentious issue and often litigated in the courts.

In Maryland, the eligibility requirements for a domestic partner to receive health benefits are fairly straightforward. An employee or retired employee and the employee or retired employee's domestic partner must:

- be of the same gender;
- be at least 18 years old;
- not be related to each other by blood or marriage within four degrees of consanguinity under civil law rule;
- not be married, in a civil union, or in a domestic partnership with another individual;
- have been in a committed relationship of mutual interdependence for at least 12 consecutive months in which each individual contributes to some extent to the other individual's maintenance and support with the intention of remaining in the relationship indefinitely; and,
- share a common primary residence.⁴

Proof of these requirements can be met by submitting a signed affidavit, documentation of shared residence, documentation of financial interdependence and a tax affidavit, if the employee wants to establish that the domestic partner is a tax dependent. In the event of dissolution of the domestic partnership, the employee must file an affidavit of dissolution and proof of cessation of cohabitation or proof of dissolution of financial interdependence. Even after dissolution, the domestic partner may still be eligible for continued coverage for up to 36 months. Similarly, if the employee were to pass away, the domestic partner would be eligible for continued coverage for up to 36 months.

Despite the straightforward requirements to qualify for domestic

partner health benefits in Maryland, the extension of such benefits to domestic partners is not without debate. A number of states have seen litigation over providing benefits to domestic partners. The issue has sparked arguments over the definition of marriage and the equal treatment of individuals.

Maryland Family Law Code § 2-201 provides that "Only a marriage between a man and a woman is valid in this State." In 2002, the Maryland Court of Appeals considered the issue of whether domestic partner benefits were prohibited by limitations on same-sex marriage. In *Tyma v. Montgomery Cty.*, 369 Md. 497, 515 (2002), the Maryland Court of Appeals upheld a Montgomery County Act which provided benefits to same-sex domestic partners. In that case, the appellants argued that Maryland law prohibited "recognition of same-sex and common law 'marriages' . . . [and] expressly prohibits the granting of the rights of same-sex, common law marriage to same-sex partners of Montgomery County employees disguised as a domestic partners benefits ordinance." 369 Md. at 508. The County responded that its Act did "not create a marital relationship between domestic partners;" rather, "it merely extends to domestic partners many of the employment benefits currently available to County employees' spouses." *Id.* at 509. The Court agreed, explaining, "The Act at issue in this case does not, and does not purport to, define, redefine or regulate marriage in Maryland." *Id.* at 512.

A number of states have encountered similar challenges to domestic partner benefits legislation. For example, in 1998, the Colorado Court of Appeals addressed a Denver County ordinance granting health and dental benefits to domestic partners. *Schaefer v. City & Cty. of Denver*, 973 P.2d 717, 719 (Colo. Ct. App. 1998), *cert. denied*, (Colo. Apr. 12, 1999). The court heard a number of arguments to strike the ordinance, including that the extension of health insurance benefits to domestic partners conflicted with the traditional definition of family and, thus, impacted the Colorado Uniform Marriage Act. *Id.* at 721. Nonetheless, the court upheld the ordinance. "The ordinance qualifies a separate and distinct group of people who are not eligible to contract a state-sanctioned marriage to receive health and dental insurance benefits from the City. Therefore, the ordinance does not adversely impact the integrity and importance of the institution of marriage." *Id.*

However, the Michigan Supreme Court reached a different conclusion in *National Pride at Work, Inc. v. Governor of Michigan*, 481 Mich. 56; 748 N.W.2d 524 (2008). In that case, certain public employers had extended health-insurance benefits to same-sex domestic partners. However, Michigan's 2004 marriage amendment stated, "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement

recognized as a marriage or similar union for any purpose.” *Id.* at 67; 532. The court determined that a domestic partnership was being recognized as a similar union to marriage. *Id.* at 86-87; 543. Thus, the public employers were prohibited from extending such benefits to domestic partners. *Id.*

Although the Michigan court prohibited benefits for domestic partners for public employees, that case does not appear to be analogous to the situation in Maryland. The major difference being that the language of the marriage amendment in Michigan is far broader than the Maryland definition of marriage. *Compare* Mass. Const. Art. I, § 25 (2009) with Md. Family Law Code Ann. § 2-201 (2008). The Maryland definition is unlikely to affect the extension of health benefits to domestic partners of state employees because the extension of such benefits in Maryland does not seek to recognize nor validate same-sex marriage. Additionally, the holding in *Tyma* seems to indicate the Maryland Court’s opinion on the matter, albeit on a county level.

There has also been litigation over whether limiting benefits to same-sex domestic partners violates equal protection. As noted above, to receive the benefits in Maryland the domestic partners must be of the same sex, thereby precluding unmarried heterosexual partners from receiving such benefits. This issue was raised in *Irizarry v. Board of Education of the City of Chicago, Illinois*, 251 F.3d 604 (7th Cir. 2001). In that case, a heterosexual woman argued that she was being denied equal protection when she was unable to qualify for domestic partnership benefits. *Id.* at 606. The court explained that, “Only when the plaintiff in an equal protection case is complaining of a form of discrimination that is suspect because historically it was irrational or invidious is

there a heavier burden of justifying a difference in treatment than merely showing that it is rational.” *Id.* at 610. Thus, the court held that heterosexuals cohabitating outside of marriage did not constitute a protected class and the rational basis standard applied. *Id.* Under this analysis, the court found that it was rational to refuse to extend domestic partnership benefits to a person who has the option to marry. *Id.*

The extension of domestic partnership benefits in Maryland is an important step in ensuring equal employment benefits for all employees. Additionally, it recognizes the importance of providing healthcare and offering such care to individuals who are unable to marry. Although the debate over same-sex domestic partners and the definition of marriage will almost certainly continue, it appears likely that Maryland’s decision to provide healthcare benefits to domestic partners of state employees would withstand a legal challenge.

Footnotes:

¹See Equality Maryland, 2009 Legislative Wrap-Up, Apr. 14, 2009, http://www.equalitymaryland.org/pr_2009/pr2009.04.14.htm.

² *Id.*

³ See Equal Rights Colorado, Legislative Updates, http://www.kintera.org/site/c.qkI0KeMWItF/b.3809063/k.F759/Legislative_Updates.htm (last visited May 21, 2009).

⁴ See Maryland Department of Budget and Management, Same Sex Domestic Partner Frequently Asked Questions for July 2009-June 2010, http://www.dbm.maryland.gov/dbm_publishing/public_content/dbm_search/employee_services/health_benefits/2010_health/same_sex_domestic_partner_frequently_asked_questions.pdf (last visited May 18, 2009).



Information for Maryland Practitioners Regarding Victims of Domestic Violence

By Noah Schabacker

Domestic violence is not limited to an economic class, race, gender, ethnicity, age, or religion.¹ In 2005, a national benchmark survey of 1,200 employed adults conducted by the Corporate Alliance to End Partner Violence found that 44% of employed adults surveyed personally experienced the effect of domestic violence in the workplace; 21% of respondents of both sexes identified themselves as victims of intimate partner violence; and 64% of victims of domestic violence indicated that their ability to work was affected by the violence.²

While Maryland does not recognize specific employment protections for victims of domestic violence, Maryland courts are taking notice of the problem of domestic violence throughout the state, with the Court of Appeals and other Maryland courthouses hosting “A Line in the Sand: A Photographic Exhibit Chronicling Maryland’s Fight Against Domestic Violence And The People Who Have Led The Way.”³ Through the creative use of national and other state laws, Maryland employment lawyers have a unique opportunity to address an undeveloped area of Maryland law to assist victims of domestic violence who lose their jobs because they are seeking temporary protection orders against their abusers.

THE IMPACT OF DOMESTIC VIOLENCE IN THE WORKPLACE

Domestic violence is a pattern of behavior in which one intimate partner member uses physical violence, coercion, threats, intimidation, isolation, and emotional, sexual, or economic abuse to control the other partner or another family member. See AMERICAN BAR ASSOCIATION, KNOW YOUR RIGHTS DOMESTIC VIOLENCE (2001), <http://www.abanet.org/publiced/domviol.pdf>. Domestic violence is not defined by physical acts. *Id.* Instead, it is a combination of behaviors that affect all areas of a victim’s life.

One quarter of women will be victims of domestic violence at

some point in their lives.⁴ Victims of domestic violence may need to take leave from work to go to court to seek protection orders or may miss work due to illness or injury caused by the violence. They may also need counseling or other forms of assistance to cope with the trauma. All of these needs may exceed the limited leave provided by their employer, if the employer provides any leave at all.

At the same time, a perpetrator seeking to maintain power and control over his relationship with the victim may stalk her at work, threaten her or her coworkers, or engage in other behavior that threatens or distracts the victim while at work. In fact, the victim and the perpetrator may be employed by the same employer. Survey results released in 2003 by the Council for Women & Domestic Violence Commission in North Carolina showed

that 28% of abusers worked for the same employer as their victims.⁵ In addition, a 2003 study conducted by the Maine Department of Labor found that 78% of perpetrators used workplace resources at least once to express remorse or anger, or check up on, pressure, or threaten their victims, and that 74% of perpetrators had easy access to their victim’s workplace.⁶

POTENTIAL FEDERAL PROTECTION FOR VICTIMS OF DOMESTIC VIOLENCE

Sexual assault, stalking, and other similar harassment may constitute unlawful sexual harassment under Title VII of the Civil Rights Act of 1964. See *Ferris v. Delta Airlines*, 277 F.3d 128, 134-37 (2d Cir. 2001) (overturning a grant of summary judgment for the defendant where the plaintiff alleged off duty sexual assault by a coworker as a component of a hostile work environment claim). The victim must not have unreasonably failed to take advantage of corrective opportunities provided by the employer; and if

the perpetrator was a supervisor, or the employer knew or should have known of abuse that involved the workplace and failed to take prompt and appropriate remedial action, then the employer may be liable for the abuse in the workplace. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765-70 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-808 (1998).

Similarly, the Americans with Disabilities Act (“ADA”), as amended by the ADA Amendments Act of 2008, may provide protection for victims of domestic violence. 42 U.S.C. §§



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12101-12117 *as amended*. Employers are prohibited from discriminating against an employee because she has, has a record of having, or is regarded as having a disability. 42 U.S.C. § 12102(1); 42 U.S.C. § 12112. If a victim of domestic violence experiences mental or physical injuries resulting from domestic violence, an employer may also be required to provide reasonable accommodation. *See* 42 U.S.C. § 12111(9); 42 U.S.C. § 12112(b)(5). For instance, a victim suffering from post-traumatic stress disorder or other mental or physical impairments that substantially limits a major life activity or the operation of a major bodily function may be entitled to an accommodation at work. *See* 42 U.S.C. § 12102(2) (providing a non-exhaustive list of major life activities and major bodily functions that may be substantially impaired by a disability); 42 U.S.C. § 12112(b)(5).

MARYLAND PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE

MARYLAND EMPLOYMENT DISCRIMINATION LAWS MAY PROTECT VICTIMS OF DOMESTIC VIOLENCE

Maryland does not have any widely applicable workplace protections specifically for victims of domestic violence. However, Maryland's antidiscrimination in employment statutes may provide similar protections to those afforded by the federal laws referenced above. *See* Md. Ann. Code art. 49B, §§ 14-17 (2008). Maryland State employees may also be entitled to specific domestic violence related employment protections under Executive Order No. 01.01.1998.25 (1998).⁷ This Executive Order, among other directives to State agencies, prohibits "unfair treatment of employees by the employers based solely on their status as victims of domestic violence." Executive Order No. 01.01.1998.25. Depending on the policies adopted by each State agency in response to this Order, victims may be able to avoid discipline for job performance or conduct problems caused by the domestic violence.

MARYLAND'S AT-WILL EMPLOYEES MAY STATE A CLAIM FOR WRONGFUL DISCHARGE IF FIRED FOR SEEKING A PROTECTION ORDER

Maryland's at-will employees, however, have no such protection. Despite the lack of enumerated legislative protection, at-will employees may be able to state a cause of action for wrongful discharge if dismissed for seeking a protective order to prevent further violence.⁸ The dismissed employee might argue that Maryland's public policy exception to at-will employment prevents her from being dismissed under these circumstances.

The Maryland Court of Appeals recognizes that an employee may qualify for the protection of the public policy exception to at-will employment if the employee reports "suspected criminal activity to the appropriate law enforcement or judicial official." *Wholey*

v. Sears, Roebuck, & Co., 803 A.2d 482, 496 (Md. 2002) (rejecting a wrongful discharge claim by a private corporate security officer who investigated suspected wrongdoing but did not report it to the police). Because a person seeking a protective order must allege criminal activity to a judicial officer to receive a protective order, she may fall within the protection of this identified public policy exception to at-will employment.

The statute describing the protective order process requires that the person petitioning for the order must allege the underlying criminal activity to either a commissioner or a judge. *See* Md. Code Ann., Fam. Law § 4-504.1(b) (LexisNexis 2008); Md. Code Ann., Fam. Law § 4-505(a)(1) (LexisNexis 2008); Md. Code Ann., Fam. Law § 4-506(a) (LexisNexis 2008). Therefore, the victim is reporting suspected criminal activity to the "appropriate . . . judicial official," and should be protected by the public policy exception to at-will employment. *Wholey*, 803 A.2d at 496. The victim does not need to actually press charges, and the ultimate outcome of the report to the judicial official does not affect the protection afforded to the person who reports the criminal activity. *See id.*

ADDITIONAL RESOURCES

There are a number of resources available for practitioners who are looking for further information on representing victims of domestic violence. The American Bar Association Commission on Domestic Violence maintains a wealth of information at <http://www.abanet.org/domviol>. For employment lawyers, the Commission has a specific web page dedicated to the topics of domestic violence and employment law at http://www.abanet.org/domviol/resource_employment_law.html. Both the Commission on Domestic Violence and the Maryland Network Against Domestic Violence (<http://www.mnadv.org/>) provide training for practitioners who represent victims of domestic violence. The House of Ruth, <http://www.hruth.org>, and the Women's Law Center of Maryland, <http://www.wlcmd.org>, also provide direct services to victims of domestic violence.

CONCLUSION

Domestic violence is a crime that carries repercussions for victims and their loved ones beyond the dangerous privacy of home. Employers should take the necessary steps to protect their employees. But when a survivor experience negative consequences at work because of the abuser's actions, the law should safeguard her employment. It is up to attorneys to ensure that the law provides that protection.

Footnotes:

¹ *See, e.g.*, Andrea Newell, *Addressing the Elephant in the Boardroom: Domestic Violence in the Workplace* (Apr. 16, 2009), <http://www.theglasshammer.com/news/2009/04/16/addressing->

[the-elephant-in-the-boardroom-domestic-violence-in-the-workplace/](#).

² Corp. Alliance to End Partner Violence, *Workplace Statistics* (September 2007), http://www.caepv.org/getinfo/facts_stats.php?factsec=3/.

³ A schedule of appearances for the exhibit, sponsored by the House of Ruth, is available at <http://www.hruth.org/a-line-in-the-sand.asp/>.

⁴ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

⁵ Kelli White & Leslie Staronek, *Impact of Battering on the Workplace: Survey of Abuser Treatment Program Participants* (North Carolina) (Sept. 2003), [http://www.caepv.org/membercenter/files/Impact%20of%20Battering%20Report%20for%20Website%20\(North%20Carolina\).doc](http://www.caepv.org/membercenter/files/Impact%20of%20Battering%20Report%20for%20Website%20(North%20Carolina).doc).

⁶ MAINE DEP'T OF LABOR & FAMILY CRISIS SERVS., IMPACT OF DOMESTIC VIOLENCE OFFENDERS ON OCCUPATIONAL SAFETY & HEALTH: A PILOT STUDY (February 2004), available at http://www.maine.gov/labor/labor_stats/publications/dvreports/domesticoffendersreport.pdf; see also MAINE DEP'T OF LABOR & FAMILY CRISIS SERVS., DOMESTIC VIOLENCE SURVIVORS AT WORK: HOW PERPETRATORS IMPACT EMPLOYMENT (October 2005), available at http://www.maine.gov/labor/labor_stats/publications/dvreports/survivorstudy.pdf.

⁷ Md. Exec. Order No. 01.01.1998.25, 25:23 Md. R. 1684 (Oct. 1, 1998), available at <http://www.dsd.state.md.us/comar/01/01.01.1998.25.htm/>.

⁸ Protective orders are a form of civil relief available to individuals who allege that they are subject to abuse. See Md. Code Ann., Fam. Law § 4-504(a) (LexisNexis 2008). "Abuse" includes serious bodily harm, placing another in fear of imminent serious bodily harm, assault, rape, false imprisonment, and stalking as defined by the criminal code. Md. Code Ann., Fam. Law § 4-501(b) (LexisNexis 2008).

Best Practices: The Direct Threat Defense

By Julie Rook

The Americans with Disabilities Act ("ADA") states that an employer can defend itself against a charge of disability discrimination by demonstrating that the employee would present a direct threat to the health and safety of other individuals in the workplace. See 42 U.S.C. § 12113. Direct threat affirmative defenses have seldom been appealed in Maryland courts. Only one case from the Maryland Court of Special Appeals mentions the direct threat defense in the context of the ADA. See *Ridgely v. Montgomery Cty.*, 883 A.2d 182 (Md. Ct. Spec. App. 2005). In that case, the Court did not provide a review of the defense.

Recently, the Equal Employment Opportunity Commission ("EEOC") updated its guidance on Applying Performance and Conduct Standards to Employees with Disabilities ("guidance") to reflect the recent changes to disability discrimination law in the ADA Amendments Act. Equal Employment Opportunity Commission, *The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, Oct. 14, 2008, <http://www.eeoc.gov/facts/performance-conduct.html>. This guidance may provide practice tips for defense lawyers who wish to assert the direct threat defense.

This article discusses the direct threat defense in reasonable accommodation cases. It provides background to the Supreme Court's development of the affirmative defense, how it has been applied in the Fourth Circuit and District Court of Maryland and, finally, how the new EEOC guidance may affect this affirmative defense.

I. Background

The Supreme Court first articulated the direct threat defense when, in *Sch. Bd. Of Nassau County v. Arline*, 480 U.S. 273, 287 (1987), it stated, "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." Congress subsequently adopted this language when it amended the Rehabilitation Act (29 U.S.C. § 705(2)(D)) and codified the ADA. 42 U.S.C. § 12113.

In 1998, the Supreme Court addressed the direct threat defense in *Bragdon v. Abbott*, 524 U.S. 624 (1998). In *Bragdon*, the Supreme Court stated that the existence of a significant

risk “must be determined from the standpoint of the person who refuses the...accommodation,” and based upon objective evidence. 524 U.S. at 649. Therefore, an assessment must be made of the reasonableness of an employer’s actions in classifying an employee as a “direct threat” in light of the available medical evidence. *Id.*

The Supreme Court analyzed the direct threat defense in an employment law situation in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002). In *Echazabal*, Chevron offered to hire Echazabal if he could pass the company’s physical examination. *Id.* at 76. Echazabal underwent Chevron’s physical exam twice, and each time the doctors found a liver abnormality, which would be aggravated by exposure to toxins at Chevron’s refinery. *Id.* After each exam, Chevron withdrew its offer of employment. *Id.* After the second exam, Chevron asked the contractor employing Echazabal to reassign him to a job without exposure to harmful chemicals or remove him from the refinery altogether. *Id.* Echazabal eventually filed suit, challenging Chevron’s refusal to hire him and its refusal to let him continue working in the refinery. *Id.* at 77.

Echazabal argued that the direct threat defense did not apply to him because Chevron was not arguing that he was a threat to others; instead, Chevron was arguing that he was a threat to himself. *Echazabal*, 536 U.S. at 77. However, the Supreme Court held that the EEOC regulations regarding “threat to self,” applied to the ADA. *Id.* The Court held that the EEOC “was certainly acting within the reasonable zone” when it created its regulations concerning the direct defense threat. *Id.* at 86. The Court summed up these regulations:

The direct threat defense must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. 29 CFR § 1630.2(r) (2001).
Id.

II. Best Practices for the Use of the Direct Threat Defense

An employer can successfully set forth a direct threat defense by demonstrating through current, objective medical evidence that although the risk of transmitting a disease is unknown, the disease has severe and fatal effects. In *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999), *cert. denied*, 528 U.S. 813 (1999), an owner of a karate school refused to let the plaintiff participate in class because the plaintiff was HIV-positive. The karate school owner argued that allowing the plaintiff to participate in karate

lessons would present a direct threat to the health and safety of the school’s students and instructors. *Montalvo*, 167 F.3d at 875. The Fourth Circuit held that to classify an individual as a direct threat, an entity under the ADA must conduct an individualized assessment, weighing and balancing the “nature, duration and severity of the risk and the probability that the potential injury will actually occur.” *Id.* at 876 (quoting 28 C.F.R. § 36.208(c)). None of these factors are required to be significant on their own and the gravity of one factor might compensate for another. *Id.* at 879.

Although the Fourth Circuit emphasized that a place of public accommodation should not base its decision on whether to classify someone as a “direct threat” on “stereotypes or generalizations about the effects of a disability,” it found that the HIV-positive student was a direct threat to the school’s students and instructors despite the lack of evidence of the probability that he would ever transmit the virus to another individual. *Id.* at 876, 878. The Court reached its decision by noting the frequency in which students engaged in sparring, attack drills and body interaction and the fact that the virus is inevitably fatal. *Id.* at 877-78.

Although the Fourth Circuit agreed with the karate school that the HIV-positive student posed a direct threat to others, the karate school still had to propose an accommodation that would eliminate that risk. *Id.* at 879. If such a proposed accommodation eliminates the risk presented by the individual, the fact that the individual rejects this accommodation does not re-impose liability on the public entity. *Id.* The Fourth Circuit found that the karate school’s proposed accommodation, private karate lessons, would have eliminated the risk presented by the student’s HIV and, therefore, the school did not violate Title III of the ADA. *Id.*

Although the karate school in *Montalvo* did not need to know with certainty the probability that the student would transmit HIV to other students or instructors, it is still important to perform an individualized assessment before classifying an individual as a “direct threat.” An employer cannot solely rely on an independent medical examination of an employee it believes to be a direct threat to herself or others, unless that medical examination is thorough, performed by a qualified and knowledgeable medical practitioner, and the employer has contacted the employee’s physicians/medical professionals and reviewing any relevant applicable records. In *EEOC v. Browning-Ferris, Inc.*, 262 F. Supp. 2d 577, 580 (D. Md. 2002), the employer ordered an employee, Ms. Brown, who had worked at BFI for seven years to submit to a fitness-for-duty exam when the employee’s supervisor found out that the employee suffered from Crohn’s Disease. Ms. Brown’s job at BFI required her to be exposed to various types of trash, and her new supervisor worried that her exposure to waste was exacerbating her disability

and causing her to miss work. *Id.* at 578. A doctor hired by the employer, Dr. Talusan, conducted a fifteen-minute examination of Ms. Brown, after which he found she was not fit for duty. *Id.* at 580. Specifically, Dr. Talusan stated that she should be removed from her job because her repeated exposure to waste could lead to “serious health complications and possibly death.” *Id.* As a result of Dr. Talusan’s recommendation, Ms. Brown was terminated. *Id.* at 581.

In *Browning-Ferris, Inc.*, the District Court for the District of Maryland denied the BFI’s motion for summary judgment raising the direct threat affirmative defense. *Id.* at 592. The Court held that there were genuine issues of material fact as to whether BFI made a reasonable informed determination based on the most current medical knowledge as to whether Ms. Brown posed a direct threat to herself or others. *Id.* at 591. The Court found that a jury could reasonably find that the employer did not meet its obligations under the ADA when it solely based its decision to terminate the employee on the fifteen-minute examination conducted by Dr. Talusan. *EEOC*, 262 F. Supp. at 591. Furthermore, the Court noted that Dr. Talusan lacked experience in treating patients with Crohn’s Disease and he failed to consult with any of Ms. Brown’s treating physicians who, as it happened, disagreed with Dr. Talusan’s determination. *Id.* at 588-91.

Notably, although an individualized assessment of the person deemed to be a direct threat is very important, the failure to conduct an individualized assessment is not necessarily fatal to a direct threat defense. *See Rohan v. Networks Presentations, LLC*, 2003 U.S. Dist. LEXIS 26687, *14-15, aff’d, 375 F.3d 266 (4th Cir. 2004). In a situation where an employee exhibits suicidal behavior, an employer may prevail on a direct threat defense without having reviewed current, available medical evidence. In *Rohan, LLC*, 2003 U.S. Dist. LEXIS at *14-15, the District Court for the District of Maryland upheld Networks Presentations’ termination of Ms. Rohan because Ms. Rohan presented a direct threat to herself. Ms. Rohan suffered from post-traumatic stress disorder and major depression, which caused her to behave irrationally and make suicidal threats during her employment with Networks Presentations. *Id.* at *1. During her employment with Networks Presentations, Ms. Rohan had, on separate occasions, made superficial attempts to cut her wrists with a dull razor and had swallowed tranquilizers after threatening suicide. *Id.* at *5, 15. In granting the employer’s motion for summary judgment, the Court concluded that these “actions indicate a continuing, very severe, likely and imminent potential harm.” *Id.* at *15. The Court did not address the fact that Networks Presentations did not consult with any medical evidence, or any of Ms. Rohan’s treating physicians, before it terminated her employment. Thus, it seems that an employee’s threatening or suicidal behavior is sufficient to

prevail on a direct threat affirmative defense in a reasonable accommodation case.

III. EEOC Guidance

Whether an employer may discipline or punish an employee for unacceptable behavior that results from the employee’s disability applies to the direct threat defense primarily in cases in which the employee suffers from a psychiatric disorder. For instance, the Court of Appeals for the Second Circuit has applied previous EEOC guidance, which states that employers do not have to tolerate dangerous conduct, even if it is the result of a psychiatric disability. *See Sista v. CDC IXIS N. Am. In.*, 445 F.3d 161, 172 (2d Cir. 2006) (citing The U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, <http://eeoc.gov/policy/docs/psych.html>).

The EEOC’s updated guidance on performance and conduct standards for employees with disabilities discusses how an employer may apply these standards to employees with disabilities and the employers’ rights to not tolerate unacceptable behavior. Employers may hold individuals with disabilities to the same performance and conduct standards as other employees as long as those standards are job-related and consistent with business necessity. If an employee poses a direct threat to herself or others, and there is no accommodation that would abate that threat, the employer may terminate that employee because that employee is deemed “unqualified.” Equal Employment Opportunity Commission, *The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, Question 12*, Oct. 14, 2008, <http://www.eeoc.gov/facts/performance-conduct.html>. However, an employer may not arbitrarily require an employee to submit to a medical examination because that employee is having performance or conduct issues and the employer believes the employee poses a direct threat to herself or others. *See Question 16*. Instead, an employer must have a reasonable belief, based on objective evidence, that the employee poses a direct threat to herself or others because of a medical condition. *See id.*

IV. Conclusion

To present this affirmative defense effectively, it is important to conduct an individualized assessment of the employee, using all current and available medical evidence. It is not sufficient to subject an employee to a cursory medical examination. However, courts seem willing to overlook the lack of an individualized assessment when the employee behaves in an irrational and threatening way, such as taking affirmative actions to commit suicide. Employment defense lawyers should also advise their clients as to the appropriateness of any medical examination they

wish to impose on an employee. Employers cannot arbitrarily submit their employees to medical examinations even if they believe an employee poses a direct threat. Employers must have a reasonable belief, based on objective evidence, that the employee poses a direct threat because of a medical condition.

Recent Fourth Circuit Employment Decisions

By Tom Gagliardo

In a series of soon to be published decisions the Fourth Circuit reversed two summary decisions in favor of employers; remanded a public employee free speech case which had been dismissed; reversed and remanded another decision taking away a plaintiff's favorable jury award; and reversed the National Labor Relations Board's ruling in favor of a fired worker.

Title VII Time Limits Run from Disposition of Motion for Reconsideration

Reversing dismissal by the Eastern District of Virginia (Cacheris, J.), a Fourth Circuit panel (Wilkinson, Motz, and Traxler, JJ.) concluded unanimously that a motion for reconsideration filed with the Equal Employment Opportunity Commission ("EEOC") extends the beginning of the 90-day period during which an employee must institute a federal court action.

In a soon to be published opinion, Judge Diana Gribbon Motz wrote: "Federal employees who claim illegal discrimination by their employer may file a civil action within 90 days of a 'final' adverse decision by [EEOC]. 42 U.S.C. § 2000e-16(c) (2006). This case presents the question of when an EEOC decision becomes 'final' for the purpose of this statute. The district court interpreted an EEOC regulation to require that the 90-day period began running from the conclusion of the initial EEOC appeal—regardless of whether the employee timely files a motion for reconsideration. For this reason, the court dismissed [the] complaint as untimely. "The experienced district judge certainly offered a reasonable construction of the EEOC regulation. But we believe that Supreme Court precedent (never brought to the district court's attention by the parties), along

with the consistent judicial interpretation of the regulation and the notice that the EEOC provided to Cochran and routinely provides to aggrieved employees, mandates a contrary construction. Accordingly, we reverse." *Cochran v. Holder*, No. 07-1888 (4th Cir. May 4, 2009).

FLSA Exemption for Administrative Employees Not Applicable

Another unanimous panel (Duncan, Agee, and Faber (sitting by designation), JJ.) reversed the Southern District of West Virginia (Bailey, C.J.), which had granted summary judgment to an employer in a Fair Labor Standards Act claim.

The district court found that employees, who were "racing officials," were exempt from the Act's coverage as administrative employees in significant part because West Virginia law "require[s] and regulate[s]" the Racing Official's position, and therefore is "critical for [Charles Town Gaming] to be able to conduct its business, [as Charles Town Gaming] could not conduct its business legally without them" [citation omitted]."

The Fourth Circuit held that the district court erred by holding that "the requirement that plaintiffs' primary duties were 'directly related to [the] general business operations of the employer'" had been met.

"In reaching its conclusion," Judge Agee wrote, "the district court improperly relied on the 'critical' role of the Racing Official in that Charles Town Gaming 'could not conduct its business legally without them' [citation omitted]. However, the indispensability of an employee's position within the business cannot be the ratio decidendi for determining whether the position is directly related to the employer's general business operations. * * * That the position of Racing Official was 'indispensable' because of state law, rather than business practice, does not alter the analysis. State or local law may also require a construction company to post a flagman around a highway work site in order to coordinate traffic, but no colorable argument can be made that the flagman's work is directly related to the construction company's general business operations. Looking to the 'significance' or 'indispensability' of a position within a company's business operations diverts attention from the requisite inquiry. * * * Therefore, the district court erred in holding that the work was directly related to Charles Town Gaming's business operations because that work was necessary in order for the company to operate lawfully. * * * Simply put, the [plaintiffs'] work did not entail the administration of — the 'running or servicing of' — Charles Town Gaming's business of staging live horse races. The [plaintiffs] were not part of 'the management' of Charles Town Gaming and did not run or service the 'general business operations.'"

Desmond v. PNGI Charles Town Gaming, L.L.C., No. 08-1216 (scheduled for publication) (4th Cir. April 30, 2009).

First Amendment Rights of Public Employee Not Subject to Motion to Dismiss

In another reversal, Chief Judge Williams, Judge Wilkinson (concurring), and Judge Alarcón (sitting by designation) reversed the District of Maryland (Davis, J.), which had dismissed a Baltimore police officer's claim pursuant to 42 U.S.C. §1983. Specifically, the Court stated that the plaintiff "contends that the district court erred in determining that the allegations in his complaint did not demonstrate that the Defendants violated his First Amendment right to freedom of speech by retaliating against him for releasing an internal memorandum ("Andrew Memorandum") to a reporter for the *Baltimore Sun*. In his memorandum, Andrew requested that an investigation be conducted to determine whether the use of deadly force by a tactical unit of the [Baltimore Police Department] against a barricaded suspect was justified and properly conducted. Andrew argues that the retaliation was improper because as a citizen, he has a First Amendment right to speak about a matter of public concern. The district court concluded that Andrew's Memorandum was not protected by the First Amendment under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), because it 'never lost its character as speech pursuant to his official duties simply by virtue of the wider dissemination he elected to give it after his recommendations were ignored by the police commissioner.' *Andrew v. Clark*, 472 F. Supp. 2d 659, 662 n.4 (D. Md. 2007)."

"Whether Andrew's delivery of his memorandum to a reporter for the *Baltimore Sun* 'addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.' *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (emphasis added). Only if Andrew's speech is found to address a matter of public concern does the court then 'seek 'a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Id.* at 142 (quoting *Pickering*, 391 U.S. at 568) (alteration omitted). Resolution of these questions will depend upon the results of discovery as tested by a motion for summary judgment." *Andrew v. Clark*, No. 07-1184 (4th Cir. April 2, 2009).

Employee Privacy Rights – a Pyrrhic Victory?

A former employee, alleging invasion of her privacy while employed and more than a year after, in violation of the Stored Communications Act, lost jury awards of \$150,000 in statutory damages and \$75,000 in punitive damages against the employer's president and an additional \$25,000 in statutory damages

and \$25,000 in punitive damages against the corporate employer itself. A panel composed of Chief Judge Williams, and Judges Shedd and Agee held that without a showing of actual damages, statutory damages are unavailable; and, while a similar showing is not required for an award of punitive damages and attorney's fees, the matter was, nonetheless, remanded for further proceedings "for the district court to reevaluate [punitive damages] in light of our ruling [that the plaintiff] was not entitled to statutory damages in this case absent proof of actual damages" and the award of attorney's fees "in light of [her] lower degree of success." *Alstyn v. Elec. Scriptorium, Ltd.*, No. 07-1892 (4th Cir. March 18, 2009).

NLRB Reversed; Had Ordered Employee Reinstated

The Fourth Circuit (King and Duncan, Circuit Judges, and Rebecca Beach Smith, Judge for the Eastern District of Virginia, sitting by designation in a 2-1 decision (dissent by Judge King) reversed the National Labor Relations Board's holding that *The Tampa Tribune* violated the law when it fired an employee who had engaged in "protected concerted activity" because in exercising his rights the employee made a derogatory remark about the company vice president.

During contract negotiations, the vice president sent a series of letters to pressroom workers describing what was occurring, to which many pressmen, including the fired employee, took exception. That employee and approximately 25 others signed a letter to the vice president objecting to his characterization of the negotiations. A few days later, the vice president responded.

Shortly thereafter, the employee went into an office where two supervisors and he were the only ones present; and, in response to a question about how he was doing, said he was "stressed out." One of the supervisors asked if he had seen the vice president's latest letter, and when he replied no, the supervisor informed him that it was "likely a response" to the letter he and the other pressmen had sent. The employee then said: "I hope that fucking idiot [vice president] doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress."

No immediate action was taken by the employer. A report of the incident was made and the employee apologized. He was thereafter fired for violating workplace rules of conduct.

The administrative law judge found the dismissal was lawful because the statement was "so profane and offensive that it was not protected by the Act." The NLRB reversed the judge's decision; and the Court of Appeals reinstated it, holding that "the Board erred as a matter of law [in] concluding that the law protects . . . use of profanity regarding [an] employer, which was directed to

his supervisors, during work hours and in the work place”

In his dissent, Judge King wrote: “The panel majority has today overruled the Board and denied legal protection to an employee’s one-time use of profane language concerning a supervisor — referring to him as a ‘stupid fucking moron’ — in a private setting during intense labor negotiations. Unfortunately, my colleagues have misconstrued the facts and failed to accord the Board the considerable deference it is due under the law.” “Put simply, the panel majority today has embarked on an unjustifiable reach — making de novo findings and conclusions in this case — and substituted its judgment for a decision reserved by law to the Board.” *Media Gen. Operations, Inc. v. NLRB*, No. 08-1153 (4th Cir. March 13, 2009).



Review of Select Recent Maryland State Law Employment Decisions

By Kevin Owen

In *Hess v. Dep’t of Juvenile Servs.*, 183 Md. App. 590; 962 A.2d 1037 (2008), a Juvenile Transportation Officer (JTO) brought suit against the Department of Juvenile Services under the Maryland overtime compensation regulation seeking overtime compensation for time spent on-call status. As part of their regular duties, JTOs are responsible for working in a 24 hour on-call status for seven days in a row. The employer’s policy required the on-call JTO to respond to a page to transport a juvenile offender within thirty minutes and perform related tasks within two hours of the initial page to the JTO.

After a hearing, the state Administrative Law Judge (“ALJ”) found in favor of the employer citing both state and federal regulations. The ALJ reasoned that although the JTOs were required to maintain a close proximity to their workplace during their on-call shifts, and they were precluded from some tasks that limited their ability to report within the prescribed time-frame (pouring concrete; working with noisy tools that would prevent them from hearing their pager; or engaging in fishing and hunting), they were not limited substantially enough to warrant recovery of overtime benefits. The circuit court upheld the ALJ’s findings.

However, after a comparative analysis between federal overtime regulations and state regulations, the Court of Special Appeals found the ALJ’s reasoning to be erroneous. Specifically, the Court found language in federal regulation 29 C.F.R. § 785.17 stating that an employee required by the employer to remain “so close [to the employer’s premises] that he cannot use the time effectively for his own purposes” to be particularly illustrative of the baseline for which federal law sets for overtime compensation determinations. The Court then reasoned that because Maryland’s overtime regulations serve to provide “greater breadth” than the federal “floor,” the case was remanded to the ALJ to analyze the case as the more generous federal courts would.

“HOME MODIFICATION” BENEFITS FOR WORKERS’ COMPENSATION CLAIMS MAY BE CONSTRUED MORE BROADLY THAN “ACCESS” MODIFICATIONS.

In *Simmons v. Comfort Suites Hotel*, No. 241, 2009 Md. App. LEXIS 37 (Mar. 31, 2009), an employee filed suit against Comfort Suites seeking enforcement of a workers’ compensation

decision requiring the employer to pay for an in-home security system for the employee.

Carol F. Simmons, was employed by Comfort Suites as a night auditor. At 2:00 a.m. on September 25, 2006, Simmons “was brutally attacked with a baseball bat during an attempted robbery of the hotel.” Simmons was “left for dead” and found later “lying unconscious in a pool of blood.” After her discharge from the hospital, almost three months later, Simmons filed a claim with the Maryland Workers’ Compensation Commission requesting Comfort Suites pay for the medical care necessary for the workplace attacks as well as provide her with a home security system “to allay her fear of a home intruder.”

Comfort Suites did not contest the medical expenses, but did challenge the claim for the installation of the home security system. At the Commission’s hearing, Simmons’ neuropsychologist presented unrebutted medical testimony that she suffered from a “fear of additional assaults” and that this fear was not allayed by the fact that Simons’ son(s) resided at the house. The doctor further testified “I would strongly recommend that an in home security system be installed” and that he was “confident that Ms. Simmons will experience a reduction in fear, vigilance and resulting anxiety.”

Comfort Suites argued that a home modification is only appropriate when it is meant to assist a claimant in gaining access to their home when their would injuries otherwise render them mobility impaired (i.e., wheelchair access ramps). Following the hearing, the Workers’ Compensation Commissioner disagreed with Comfort Suites’ argument that the home security system was not covered by the statute. The Commissioner issued an order granting Simmons’ request for the security system stating, “I think this home modification ... request is probably designed to do more potential good for the condition of the patient than the modification that [Comfort Suites] cited in terms of access. Access is for someone whose condition is not going to get any better. This modification will theoretically make the condition get better.”

Comfort Suites filed a civil action in circuit court challenging the Commissioner’s ruling, and after reviewing the parties’ cross-motions for summary judgment, the court issued a ruling in favor of Comfort Suites. The circuit court concluded that the provision of a home security system as a “medical treatment” is a legal question, not a factual question. It further reasoned that the home security system “is not something that’s contemplated either by the statute” or the decision in *R & T Constr. Co. v. Judge*, 323 Md. 514 (1991) (holding that home modifications constitute “medical treatment” only when they provides access).

On appeal, the Court reversed the circuit court’s entry of sum-

mary judgment in favor of Comfort Suites. The Court stated that although “[w]e recognize that a home security system typically is not viewed as a form of medical treatment” that other Court decisions previously recognized “that items that are not intrinsically medical in nature could constitute medical treatment if there is evidence the item conveys a medical benefit.” Therefore, the Court concluded that the determination of whether the security system was “medical treatment” was a finding of fact as opposed to a finding of law. The Court remanded the case to the circuit court for a jury trial.

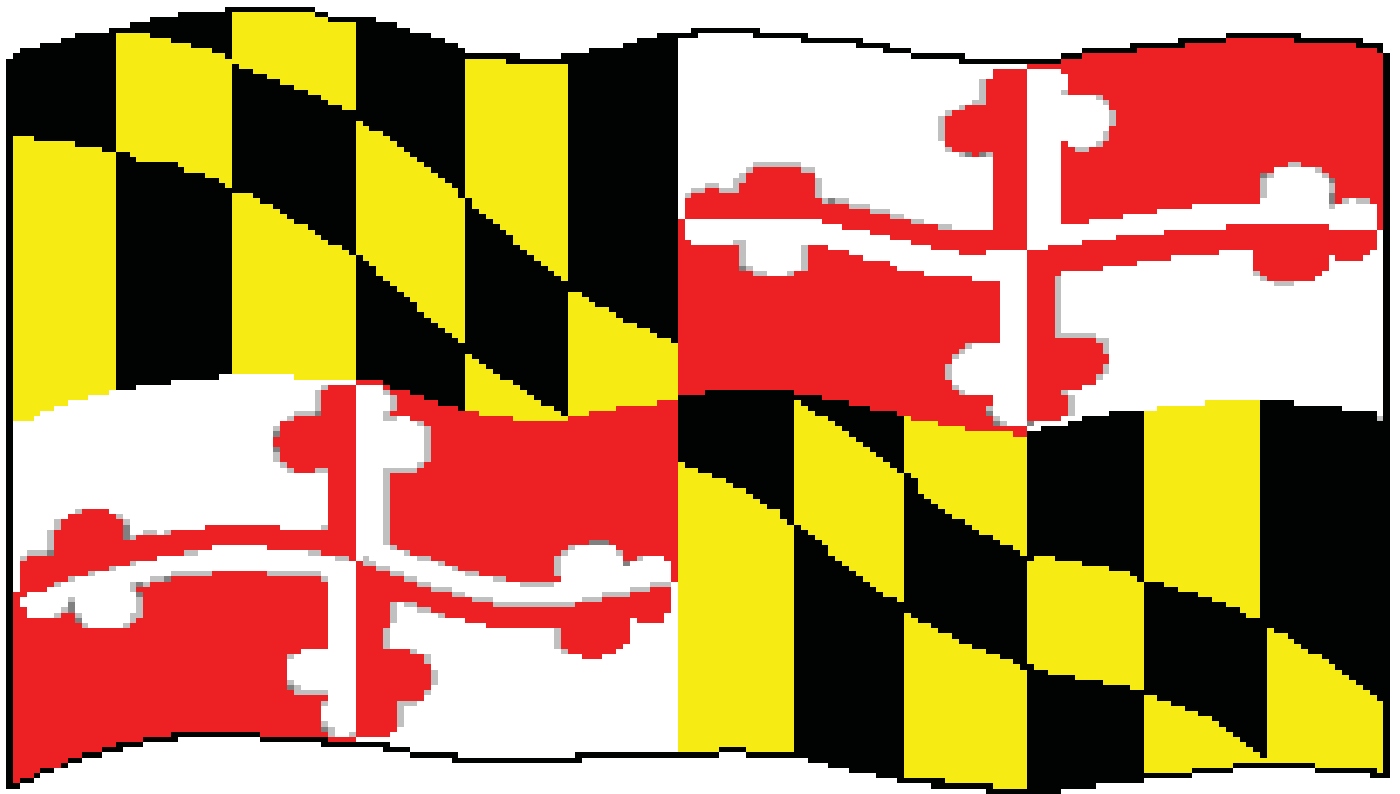
**STATE EMPLOYEE NOT ENTITLED TO ENHANCED DISABILITY
PENSION PAYMENTS BECAUSE HIS OWN MISCONDUCT GAVE RISE TO
HIS DISABLING CONDITION**

In *Thomas v. State Ret. & Pension Sys. of Md.*, 184 Md. App. 240; 964 A.2d 733 (2009), the Court of Special Appeals determined a former law enforcement officer was not entitled to enhanced disability retirement payments because his on-duty misconduct gave rise to the disabling condition.

Appellant, James H. Thomas, was employed as a Maryland State Police (“MSP”) law enforcement officer. In 2001, MSP initiated disciplinary proceedings against Thomas for “failure to properly perform his duties,” including failure to follow written procedures and submitting falsified reports. As a result of these proceedings, “Thomas sank into a state of depression that worsened over time and eventually led him to retire due to disability in 2003.” Thomas sought, and was granted, disability retirement due to his depression and was awarded normal disability benefits. Thomas also sought enhanced “special disability benefits” citing the depression was attributed to his duties with MSP.

The State Retirement and Pension System of Maryland (“SRPS”) denied his application for special disability benefits citing the fact that Thomas’s “willful misconduct was clearly a contributing factor that led to his depression.” The SRPS decision was affirmed upon review by the circuit court which found “substantial ... evidence in this record to support the ALJ’s findings that the Petitioner’s mental illness arose from the adverse disciplinary actions pending against him, which ... were instituted because of Petitioner’s willful negligence.”

Thomas sought further review by the Court of Special Appeals arguing that the sole cause of his depression was the disciplinary process against him and not his negligent performance of his duties. The Court rejected Thomas’s argument agreeing with the finding of SRPS that “Thomas’s willfully negligent conduct led directly to the proceedings [and the] disciplinary proceedings against Thomas, and the attendant emotional harm he suffered, were the natural and proximate results of Thomas’s willful failure to perform his job properly and adequately.”



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