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State Employment Law Developments

By

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Express Written Contract

Gerow v. Rohm & Haas Co., 308 F.3d 721 (7th Cir. 2002)

In a case of first impression ("The parties could not find any published decision discussing this agreement's language, or any close variation, and neither could we."), Judge Easterbrook, writing for the panel, held that a senior executive of an acquired company who had been awarded a "golden parachute" agreement granting him lucrative severance benefits in the event a change of control occurred, and who had negotiated an additional agreement with the acquiring company offering him an additional $1 million in exchange for a release of all claims and an extension of a non-competition agreement from two to three years, could not receive the $10 million he would have received had he remained employed by the company. Further, the agreement provided that the company would pay all legal fees reasonably incurred by the plaintiff-executive as a result of any contest, regardless of the outcome, initiated by the company or the executive regarding the validity, enforceability of, or liability under, any provision of the agreement. The Court of Appeals rejected his claim for appellate legal fees, stating that once the district court in its thorough opinion exposed the weaknesses in this case of first impression, it was unreasonable, although not frivolous, to proceed further and he "should have packed up his attaché case and retired from the fray."

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Riesett v. W.B. Doner & Co., 293 F.3d 164 (4th Cir. 2002)

In the controversy before the court, Maryland choice of law rules applied. In Maryland, the law of the jurisdiction where the contract was made applies to matters regarding the validity and interpretation of contract provisions and a contract is made where the last act necessary to make the contract binding occurs. Here, the last act was the signature of the sole remaining party. As the last signing party executed the agreement in Michigan, the law of that state applied. 293 F.3d at 173 n. 5.

Vesprini v. Shaw Indus., Inc., 221 F.Supp.2d 44, 64-65 (D.Mass. 2002)

The court found that a constructive discharge is a termination, particularly when there is an express, written employment contract. The court also found that a material reduction in rank constitutes a breach of contract and is tantamount to a discharge, unless the employment contract, by its terms, contemplates a change in rank and nature of the job.

Olander v. State Farm Mutual Automobile Ins. Co., 317 F.3d 807 (8th Cir. 2003) (en banc), reversing 278 F.3d 794 (8th Cir. 2002).

Over the strong dissent of Judge Loken, the majority held, applying North Dakota law, that an agency agreement was ambiguous regarding the question whether the agent was terminable at will and thus parol evidence was admissible to resolve the ambiguity. The majority held that the contractual proviso that the agency could be terminated by either party by written notice created the ambiguity in light of language in the agreement providing for a termination review procedure and language in the preamble that the parties expected that a mutually satisfactory relationship will be established and maintained. Judge Loken, in dissent, stated that the majority had ignored the general rule that silence alone does not create an ambiguity. He pointed out that every court that had reviewed this form agreement had concluded that it is unambiguously terminable at-will. In closing, Judge Loken stated: "I therefore hope that the Supreme Court of North Dakota, if presented the opportunity, will squarely reject this distortion of North Dakota contract law." Id. at 800.

The Eighth Circuit Court of Appeals reheard the case en banc, holding that an agency agreement between an insurance agent and his employer was unambiguously terminable at-will, and that there was thus no breach of the agency contract when the defendant corporation terminated the agent after he refused to take a leave of absence after being charged with murder. The Eighth Circuit stated that the agreement was silent as to duration which, without more, is "an unambiguous declaration that it is terminable at will by either party" and that the two other provisions that allowed for (1) a review upon request of the terminated employee and (2) a preamble that speaks of a "mutually satisfactory relationship" that is created "by the full and faitful observance and performance of the obligations and responsibilities" set forth in the contract, were not enough under North Dakota law to create an ambiguity. North Dakota law

requires looking at the four corners of the contract only and does not allow extrinsic evidence as to whether a contract is ambiguous. The dissenting judges argued that the two aforementioned provisions did create an ambiguity and that summary judgment was inapposite as factual determination could have helped to resolve the ambiguities

Detroit Tigers, Inc. v. Ignite Sports Media, LLC, 203 F.Supp.2d 789 (E.D. Mich. 2002)

The court held that, in Illinois, a signature on the written contract is not a per se requisite to enforcement. Whether a signature is a condition precedent to the completion of the contract is a question of intent. In the instant case, the contract had no limiting language suggesting that a signature was a condition precedent to the formation of a contract, and thus the acts or conduct of the parties may meet the requirement for mutual assent.

Brozo v. Oracle, 324 F.3d 661 (8th Cir. 2003)

The Court of Appeals for the Eighth Circuit reversed a lower court judgment for a plaintiff-employee, holding that an employment contract between was not ambiguous where an employer could change the commission under the contract at any time, where the contract was negotiated at arms-length, and where the Executive Vice President of the employer had final discretion respecting the administration and interpretation of the contract. The appellate court also held that the employee was unable to counter the employer's Vigoro argument that a contract term left to the discretion of one party is virtually unreviewable, because the employee had not alleged bad faith, fraud, or gross mistake at trial, and an appellate court may only entertain new legal and not new factual arguments.

Lyons v. Midwest Glazing, 265 F.Supp.2d 1061 (N.D.Iowa 2003).

The Northern District Court of Iowa found that a third-party beneficiary stepson of a deceased employee was entitled to enforce a "for cause" employment contract, under which the employer had the burden of proving cause for termination. In a bench trial, the court found that just cause for termination existed where the employee had a negative attitude and poor morale that affected the attitudes of other employees and the employee used more paid time off than he was allowed pursuant to the employment agreement. In dicta, the court cast doubt on the validity of damages for the value of plaintiff's "sense of job security" and the additional work hours he was forced to perform at his subsequent job. The court also found that the defendant employer's counterclaims for tortuous interference and breach of fiduciary duty were waived when not included in a pre-trial order, and they would have failed on the merits. Any loss of business stemming from the fact that customers felt loyal to the terminated employee was not tantamount to tortuous interference and no breach of fiduciary duty existed when only idle threats were made that the plaintiff would take another employee with him upon termination.

Howard University v. Lacy, 828 A.2d 733 (D.C.C.A. 2003)

The District of Columbia Court of Appeals held that the trial court erroneously invoked offensive collateral estoppel in a case where an Employee Handbook for the defendant university had been treated as an enforceable contract in prior cases involving other plaintiffs, because the issue as to whether the handbook was, in fact, a contract was not contested or litigated in the prior cases. Further, evidence of the subjective intent of parties is necessary to determine whether a handbook is a contract where an ambiguity exists between the parties and such evidence is not provided by prior cases involving other parties, especially when the cases are "quite distinguishable." In dicta, the court stated that front and back pay damages awarded by the jury were not excessive, but it did set aside a tuition remission award as speculative, because it supposed that the plaintiff's daughter would inevitably choose to attend defendant university eleven years after the termination and that the plaintiff would have remained with the university for that time but for the termination.

Silvestri v. Optus Software, Inc., 175 N.J. 113, 814 A.2d 602 (N.J. 2003)

The Supreme Court of New Jersey overturned an appellate court reversal of a trial court decision to grant summary judgment in a breach of employment contract action where the defendant employer terminated the employee for poor performance pursuant to a contract provision that provided for termination when the employee exhibited poor performance. The court held that without contractual language that explicitly warrants a contrary view, a subjective standard is to be applied in employment contracts to satisfaction clauses, although such clauses are subject to the provision that the employer act in accordance with good faith and fair dealing. Further, applying the subjective test, the court found that the plaintiff did not make a prima facie case with respect to whether dissatisfaction of the defendant was genuine, nor did he even assert such a claim, arguing only that under an objective standard, such dissatisfaction was not genuine. Justice Zazzali dissented, stating that the contract contained provisions which could be construed as creating objective standards, by which the employer was making its decision and, that even if a subjective standard were applied, there may have been facts that existed which would have led a reasonable finder of fact to find that the defendant's dissatisfaction with the plaintiff's performance was not genuine.

Brown v. Cushman & Wakefield, Inc., 235 F.Supp.2d 291 (S.D.N.Y. 2002)

The court enforced a contract provision that waived the right to a trial by jury in "any matters whatsoever arising out of" the employment agreement against all claims brought by the plaintiff employee, including those that applied to alleged discrimination by the employer. The court also granted summary judgment to defendant on its counterclaim, holding that the plaintiff was required to return to defendant payments that were erroneously made to her during her maternity leave when there existed an agreement that her maternity leave was to be unpaid.

Bonuses

Windesheim v. Verizon Network Integration Corp., 212 F.Supp.2d 456 (D.Md. 2002)

The court, in a highly fact specific dispute, found corporation's bonus incentive plan did not create enforceable contract under Maryland law. See also Johnson v. Schenley Distillers Corp., 28 A.2d 606 (Md. 1942) (Maryland recognizes no enforceable contractual obligation when employer offers employees a bonus for doing that which an employee is already required to do pursuant to the terms of the engagement of employment.)

Implied Contract

Horn v. New York Times, 739 N.Y.S.2d 679, 293 A.D.2d 1, 18 IER Cases (BNA) 743 (N.Y. App. Div. 2002)**,** reversed, 100 NY.2d 85, 790 N.E.2d 753, 760 N.Y.S.2d 378 (N.Y. 2003)

Over a stinging dissent, the court expanded the exception to the employment-at-will doctrine enunciated in Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992) to an in-house physician employed by a newspaper as its medical administrator for the paper's personnel. The doctor alleged the paper directed her to disclose the content of confidential medical records, without the employees' consent or knowledge, in violation of ethical guidelines governing her profession. She alleged that she was terminated when she refused to comply. The court recognized an implied-in-law contract. In Wieder, the Court of Appeals limited a law firm's unfettered right to discharge an associate on the basis of an implied-in-law obligation on the part of the law firm to deal fairly and in good faith with the associate.

The Court of Appeals of New York reversed the lower appellate court findings, declining to expand the Wieder exception to this case. The majority distinguished Wieder on the ground that the facts in that particular case led to a cause of action "because of the unique confluence of specific, related factors" and that the exception did not apply to the respondent physician terminated by a non-medical employer due to her refusal to provide confidential medical information to personnel regarding patients without their consent, even if this would have violated the physician-patient privilege, the violation of which could have resulted in the loss of professional license. Judge Read, joined by several other judges, dissented on the ground that "no sound reason exists to preclude termination of a lawyer in Wieder while leaving without a remedy a doctor whose job it is to protect the physical and mental well-being of individuals."

Dantley v. Howard Univ., 801 A.2d 962 (D.C. 2002)

In a line of cases following Sisco v. GSA Nat'l Capital Fed. Credit Union, 689 A.2d 53 (D.C. 1997) and U.S. ex rel. Yesudian v. Howard Univ., 153 F.3d 731 (D.C. Cir. 1998), the court held that summary judgment was inappropriate on an implied contract claim based on an employee handbook that disclaimed contractual intent because it did not contain an express

reservation of the employer's right to terminate employees at will. See also, Strass v. Kaiser Found. Health Plan of Mid-Atlantic, 744 A.2d. 1000 (D.C. 2000).

Inscho v. Exide Corp., 33 P.3d 249 (Kan. Ct. App. 2001)

While recognizing that the existence of an implied contract is generally a jury question, the court held that a jury determination is not always required. The court in holding that the plaintiff's unilateral expectation of continued employment did not create a fact dispute, stated:

> "The defining facts in this case were Inscho's uncontroverted and admitted conduct of grabbing her opponent's hair and pulling her forward which constitutes participation in a fight. These actions violated Exide's written code of conduct and the trial court correctly determined that just cause supported the termination of Inscho's employment. The trial court did not err in granting summary judgment to Exide."

The court also stated that Stover v. Superior Indus. Int'l, Inc., 29 P.3d 967 (Kan.App. 2000) suggests that in all cases where there is an allegation of an implied contract, a jury must decide the issue and Stover also suggests that the issues of "sufficient evidence" makes it a jury question.

Hoff v. City of Casper-Natrona County Health Dept., 33 P.3d 99 (Wyo. 2001)

The Supreme Court held that the employer had made clear and unambiguous its intention not to be contractually bound by its personnel rules and regulations by stating in a separately acknowledged disclaimer that they were not a contract. The court distinguished Bouwens v. Centrilift, 974 P.2d 941 (Wyo. 1999) and Sanchez v. Life Care Ctrs. of America, Inc., 855 P.2d 1256 (Wyo. 1993).

Wade v. Kessler Inst., 798 A.2d 1251 (N.J. 2002)

Previously, the court had recognized an employer's obligation to discharge its responsibilities under an employment manual, an implied contract, in good faith, that is, a Woolley contract containing an implied covenant of good faith and fair dealing like any other employment agreement. Noye v. Hoffmann – La Roche Inc., 570 A.2d 12 (N.J. Super. A.D. 1990), *certif. denied*, 584 A.2d 218 (1990). Also, the court had explained that a party's performance under a contract may breach the implied covenant even though the performance does not violate a pertinent express term. Wilson v. Amerada Hess Corp., 773 A.2d 1121 (N.J. 2001). The Wade court attempted to apply those principles in a jury instruction setting.

Roberson v. Wal-Mart Stores, Inc., 44 P.3d 164 (Ariz. Ct. App. 2002)

Over a strong dissent, the court found that Wal-Mart's disclaimers in its job application and employee handbook overcame the argument that an implied-in-fact contract had been created. The plaintiff had signed three disclaimers.

County of Giles v. Wines, 546 S.E.2d 721 (Va. 2001)

The Supreme Court of Virginia held that personnel policy, stating that employee "may" be discharged for misconduct or other just cause, was insufficient to rebut the strong presumption in favor of finding an at-will relationship. The word "may" does not indicate that the employee "shall only" be discharged for misconduct or other just cause. Three justices dissented, stating that "[t]he majority has imposed this new 'rule', which eviscerates the historic role of the jury in employment termination cases…"

Cotran v. Rollins Hudig Hall Int'l, Inc., 948 P.2d 412 (Cal. 1998)

The California Supreme Court held that when an employee, who was hired under an implied contract not to be terminated except for "good cause," is discharged for misconduct, the jury's role is not to determine whether the misconduct occurred, but rather whether the employer had reasonable grounds for believing that the misconduct occurred and otherwise acted fairly. In doing so, the court rejected the so-called Toussaint rule where a Michigan court held that the jury's role is to review de novo the alleged misconduct. Toussaint v. Blue Cross, 292 N.W.2d 880 (Mich. 1980). In Cotran, the court stated that "the role of the jury is to assess, through the lens of an objective standard, the reasonableness of [the employer's decision that just cause to terminate exists] under the circumstances known to the employer at the time it was made …" 948 P.2d at 417.

Promissory Estoppel

Robinson v. Detroit News, Inc., 211 F.Supp.2d 101 (D.D.C. 2002)

Plaintiff alleged that, in reliance on defendant's promise to train her sufficiently in transactional business if she were to accept its job offer, she left a secure job in Baltimore; that defendant failed to train her; that the failure led to her dismissal; and that her career path and employment record were permanently damaged and she suffered financial hardship. The court, based on these allegations, allowed plaintiff's promissory estoppel claim to proceed to trial.

Gunthorpe v. DaimlerChrysler Corp., 205 F.Supp.2d 820 (N.D. Ohio 2002)

The court granted summary judgment on a promissory estoppel claim as plaintiff failed to establish that defendant had promised he would be employed for at least 12-15 more years, i.e.,

until retirement, at a particular plant. Failing to establish a genuine factual dispute regarding the making of such a promise, defendant was granted summary judgment as plaintiff failed to establish the first element of promissory estoppel, that is, a promise.
Prentice v. UDC Advisory Servs., 648 N.E.2d 146 (Ill. 1995)

The Prentice court, in explaining that while pleading promissory estoppel and breach of contract in the alternative is generally permissible, stated:

> "[P]romissory estoppel is a method to enforce promises that do not meet the requirements of consideration. It is not intended to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract."

Id. at 151; See also Detroit Tigers, Inc. v. Ignite Sports Media, LLC, 203 F.Supp.2d 789, 799-800 (E.D. Mich. 2002) (applying Illinois law).

Skywalker Comms. of Ind., Inc. v. Skywalker Comms., Inc., 333 F.3d 829 (7th Cir. 2003)

The Court of Appeals affirmed a District Court judgment, holding that while written documents related to the same transaction and signed by the party to be charged can be taken in aggregate to show that an amended oral contract exists even if there is no particular written document memorializing that contract, the statute of frauds bars a finding that exists where the documents in question could as easily evince that the prior written contract still controlled. Further, while promissory estoppel can generally be invoked to circumvent the statute of frauds, the court held that there is no valid claim for promissory estoppel when the purported reliance did not give "compelling evidence of the existence or terms of a later oral agreement."

APJ Assocs., Inc. v. N. Am. Philips Corp., 317 F.3d 610 (6th Cir. 2003)

The Court of Appeals held, among other things, that the Michigan Sales Representative Act did not supersede the agreements between a manufacturer and its representative firm and that the agent is not a procuring cause of the transaction where "the agent does not participate in the negotiation of a given contract of sale." The court further held that promissory estoppel and unjust enrichment could not be claimed where an express contract between the parties that was contained in a written agreement.

Unjust Enrichment

Ingram v. Rencor Controls, Inc., 217 F.Supp.2d 141 (D.Me. 2002)

An unjust enrichment claim lies where (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is allowed only when the benefit allegedly confined is not the subject of an existing contract.

Plaintiff was a salesman for the defendant. The defendant verbally promised to provide plaintiff with 10% of defendant's stock and bonus compensation if plaintiff was able to maintain past sales revenue with a reduced sales staff. All of these promises were made to induce the plaintiff to not resign from defendant. Plaintiff achieved the sales revenue goal. Defendant did not transfer the stock and did not pay the bonus. As the breach of contract claim was banned by the statute of frauds, the court considered the unjust enrichment claim. The court denied a motion to dismiss the claim as plaintiff alleged he conferred a benefit on defendant by his work as an employee that increased defendant's revenues and by his agreement to continue working for the defendant after he had announced he was going to resign.

Kwang Dong Pharm. Co. v. Han, 205 F.Supp.2d 489, 497 (D. Md. 2002)

Maryland recognizes an unjust enrichment claim where there is a contract if there is evidence of fraud or bad faith. See County Comm'rs of Caroline Co. v. J. Roland Dashiell & Sons, Inc., 358 Md. 83, 747 A.2d 600, 608-09 (2000). As the plaintiff in Kwang Dong Pharm. Co., did not plead fraud, the claim did not lie. Typically, an unjust enrichment claim is barred where an express contract exists. See, e.g., United States v. EER Systems Corp., 950 F.Supp. 130, 133 (D. Md. 1996); Schiff v. AARP, 697 A.2d 1193, 1194 (D.C. 1997).

Public Policy Tort

Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800 (Iowa 2003)

The court affirmed summary judgment for the employer on plaintiff's sex discrimination claim under state law wherein plaintiff argued that the employer's grooming policy constituted disparate treatment on the basis of sex. The employer's grooming policy prohibited males, but not females, from wearing earrings. The plaintiff-employee was terminated after he refused to remove an ear stud during work hours. The court stated: "the sex discrimination provisions of Title VII and the [Iowa Civil Rights Act] were enacted to stop the perpetuation of sexist or chauvinistic attitudes in employment which significantly affect employment opportunities. Title VII and the [state statute] were not meant to prohibit employers from instituting personal grooming codes which have a de minimus affect on employment."

Imes v. City of Asheville, 594 S.E.2d 397 (N.C. Ct. App. 2004)

The North Carolina Court of Appeals held that an employee allegedly terminated because he was a victim of domestic violence could not sue for wrongful discharge in violation of public policy. The court stated: "the complaint filed in the instant case does not allege that [the employer's] conduct violated any explicit statutory or constitutional provision, nor does it allege [that the employer] encouraged plaintiff to violate any law that might result in potential harm to the public."

Jackson v. Morris Communication Corp., 657 N.W.2d 634 (Neb. 2003)

The Nebraska Supreme Court recognized that an at-will employee allegedly terminated for filing a workers' compensation claim could sue for retaliatory discharge.

Pietruszynski v. The McClier Corp., 788 N.E.2d 82 (Ill. App. Ct. 2003)

The Illinois Appellate Court held that an at-will employee allegedly terminated for testifying on behalf of a co-worker at a workers' compensation hearing could sue for wrongful discharge.

Himmel v. Ford Motor Co., 342 F.3d 593 (6th Cir. 2003)

The court reversed summary judgment for the employer, holding that under the law of Ohio an employee who alleged that he was terminated for complaining about federal labor law violations could sue for wrongful discharge even though the plaintiff-employee participated in the wrongful conduct.

Maw v. Advanced Clinical Communications, Inc., 820 A.2d 105 (N.J. Super. Ct. App. Div. 2003)

The New Jersey Appellate Division, reversing the trial court, held that the plaintiff could sue for wrongful discharge where she alleged that she was terminated from a "low-level" position for refusing to sign an "invalid" non-compete agreement. The court found that New Jersey's "strong prohibition against restraint of trade, and against unduly burdening employees by restricting their right to engage in their chosen field of employment, establishes the public policy necessary to support" a public policy tort claim.

Kittle v. Cynocom Corp., 232 F.Supp.2d 867 (S.D. Ohio 2002)

The court recognized a public policy tort claim based upon the Ohio anti-discrimination statute where the employer employed less than the requisite number of employees for coverage under the state statute.

Pytlinkski v. Brocar Prod., Inc., 760 N.E.2d 395 (Ohio 2002)

The Ohio Supreme Court reversed a lower court decision that had granted a motion to dismiss, because the statute of limitations had run. The lower court had held that the plaintiff

failed to bring a wrongful discharge suit within 180 days, which the Ohio Whistleblower Act required, but the Ohio Supreme Court articulated a common-law claim for wrongful discharge in violation of public policy, the statute of limitations for which was four years under Ohio common law. Two justices concurred and one justice dissented, arguing that the 180-day limit should have been applied, though the concurring justices believed that Ohio common law compelled them to apply the four-year rule because of *stare decisis* principles only.

Szaller v. Am. Nat'l Red Cross, 293 F.3d 148 (4th Cir. 2002)

The court declined to expand public policy to include an employee internal complaint/report to Red Cross' hot line alleging blood handling and staff training deficiencies. Plaintiff argued that a clear mandate of public policy could be discerned in federal regulations and a consent decree between the FDA and the Red Cross. The court rejected plaintiff's argument, stating Maryland courts "have given no indication that federal regulations or consent decrees constitute Maryland public policy", "perhaps the regulations and consent decree… would constitute clear mandates of federal policy", "federal policy is enforced by the means Congress specifies, not through state-law wrongful discharge actions." Id. at 151. The court went on to hold in dicta that the Maryland courts recognize such a claim "in only two limited circumstances: where an employee has been discharged for refusing to violate the law, or where an employee has been fired for exercising a specific legal right or duty." See also, Milton v. IIT Research Inst., 138 F.3d 519 (4th Cir. 1998).

Phillips v. St. Mary Reg'l Med. Ctr., 116 Cal. Rptr. 2d 770 (Cal. 2002)

Plaintiff sued a non-profit religious corporation, alleging that it retaliated against him for filing a complaint for race and sex discrimination with the California FEPC and the EEOC. Plaintiff's wrongful discharge claim relied on three public policies: the California anti-discrimination statute, the California constitution, and Title VII. At the time of the alleged retaliation, the California statute exempted religious entities. Thus, the court found no public policy in the state statute. But, the court went on to find a public policy in the state constitution's prohibition against race and sex discrimination and in Title VII. The court concluded that, although the public policies under the state anti-discrimination law and Title VII are in direct conflict in regards to the scope of the religious entity exception, the plaintiff may rely on Title VII as a source of public policy for his state common law cause of action for wrongful termination.

Klontz v. City of London, 2002 WL 518049, 18 IER Cases (BNA) 819 (Ohio App. 2002)

The court declined to recognize a wrongful discharge claim where the plaintiff alleged he was discharged for refusing to sign off on a project that would violate unspecified provisions of Ohio's Basic Building Code or the National Electric Code. By failing to specify a provision, the plaintiff had failed to state a clear mandate of public policy. Ohio does recognize that public

policy can be discerned from federal as well as state statutes. Kulch v. Structural Fibers, Inc., 677 N.E.2d 308 (Ohio 1997).

Hubbard v. Spokane County, 50 P.3d 602 (Wash. 2002) (en banc)

The court found a clear mandate of public policy in the zoning code which prohibits issuance of a permit to build a new hotel at the airport as well as the airport master plan. The dissent claimed that plaintiff had failed to specify any provision of the code that would have been violated. The majority argued that the dissent required plaintiff to prove that the code would have been violated. Following decisions from Oklahoma and California, the majority concluded that enforcement of the zoning code to ensure uniform planning and the general safety and welfare of the county creates a valid public policy.

Bammert v. Don's Super-Valu, Inc., 646 N.W.2d 365 (Wis. 2002)

Plaintiff's husband was a police officer. Her husband participated in the arrest of her boss's wife for drunk driving. Shortly thereafter, plaintiff was fired, allegedly in retaliation for her husband's participation in the arrest of her boss's wife. Plaintiff sued for wrongful discharge. The majority refused to extend the public policy tort claim to a firing in retaliation for the actions of her non-employee spouse. The court declined to extend the doctrine to terminations in retaliation for conduct outside the employment relationship or to terminations in retaliation for the conduct of someone other than the terminated employee. Three justices dissented.

Nolting v. Nat'l Capital Group, Inc., 621 A.2d 1387 (D.C. 1993)

The court rejected a retaliatory discharge claim based on the public policy prohibiting a discharge in retaliation for filing a workers' compensation claim because an administrative remedy, described by the court as "a specific and significant remedy", was specifically provided for in the Workers' Compensation Act.

Washington v. Guest Servs., Inc., 718 A.2d 1071 (D.C. 1998)

In light of the full court's decision en banc in Carl II, 702 A.2d 159 (D.C. 1999) expanding the public policy tort, which the court retroactively applied to the facts of this case, the court recognized a retaliatory discharge claim where plaintiff was allegedly discharged for attempting to persuade a fellow worker, and later her supervisor, not to violate District of Columbia health and food regulations in the kitchen at a retirement home for the elderly by spraying food with cleaning fluid.

Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 885 (D.C. 1998)

The court held that wrongful discharge claim would lie if plaintiff had been discharged by law firm for reporting alterations in "as-filed" documents. The court further held that there was no public policy exception to at-will employment where an attorney reported wrongful conduct to her superiors and the disciplinary rules governing attorneys did not mandate that a subordinate attorney must report allegedly wrongful conduct to supervisory attorneys.

Liberatore v. Melville Corp., 168 F.3d 1326 (D.C. Cir. 1999)

Plaintiff repeatedly notified management of a drug store that drugs were being improperly stored at temperatures that placed the public at risk of purchasing adulterated drugs in violation of federal and District of Columbia statutes and regulations. Eventually, plaintiff threatened to report the matter to the FDA, and allegedly was fired for threatening to do so. The court found that plaintiff had stated a claim for wrongful discharge under the expansion of that doctrine set forth in Carl v. Children's Hosp., 702 A.2d 159 (D.C. 1997) (en banc). The court rejected the defense argument that internal complaints of law violations were not covered by the public policy exception.

Thibodeau v. Design Group One Architects, LLC, 802 A.2d 731 (Conn. 2002)

The court concluded that a wrongful discharge claim may not be brought for pregnancy discrimination against an employer of fewer than three employees which was not covered by the Connecticut anti-discrimination statute. The majority distinguished decisions from Maryland, Ohio, Washington, and West Virginia on the ground that the statutory schemes involved in those cases, while exempting certain small employers, also expressly announce a broad public policy barring sex discrimination in employment by all employers. The court went on to align itself with Oklahoma which has held that wrongful discharge is not recognized because the employer is outside the statute's purview. Brown v. Ford, 905 P.2d 223 (Okla. 1995).

Wholey v. Sears Roebuck, 370 Md. 38, 803 A.2d 482 (Md. 2002)

The court recognized a public policy exception to at-will employment where the employee reported suspected criminal activity to the appropriate law enforcement or judicial official. The court emphasized that its decision was based on legislative enactments and that it refused "to take the specific factual circumstances before us and induce from it an all-encompassing exception … which declares that the act of investigating criminal activity is a per se public benefit, the termination for which, is actionable in tort law." Id. at 499. The court specifically stated that as the legislature has not created a general all-encompassing "whistleblower protection" statute which would protect employees who investigate and internally report suspected criminal activity, the court, in turn, declines to act in its stead. The court also specifically approved of the Fourth Circuit's reasoning in Adler v. American Standard

Corp., 830 F.2d 1303 (4th Cir. 1987) (Adler II) and Milton v. IIT Research Inst., 138 F.3d 519 (4th Cir. 1998).

Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002)

The court found that an in-house attorney discharged for reporting the General Counsel's unauthorized practice of law in compliance with a provision of the Code of Professional Responsibility may bring a common law claim for retaliatory discharge, the Code representing a clear and definitive statement of public policy. The state disciplinary rules composed a permissive, not a mandatory, duty to report the General Counsel's unauthorized practice. The court held that a lawyer may ethically disclose the employer's confidences or secrets when the lawyer reasonably believes that such confrontation is necessary to establish a claim against the employer. See also Rachel S. Arnow Richman, A Cause Worth Quitting for? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel, 75 Ind. L.J. 963 (2000); H. Lowell Brown, The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge, 44 Buffalo L. Rev. 777 (1996); Sara A. Corello, In-house Counsel's Right to Sue for Retaliatory Discharge, 92 Colum. L. Rev. 389 (1992); Cathyrn C. Dakin, Protecting Attorney's Against Wrongful Discharge: Extension of the Public Policy Exception, 44 Case W. Res. 1043 (1995); Michelle M. Gubola, In-house Attorneys' Claims for Wrongful Discharge: General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994), 64 U.Cin.L.Rev. 227 (1995); Nancy Kubasek, M. Neil Browne, Julie Harris, The Social Obligation of Corporate Counsel: A Communitarian Justification for Allowing In-house Counsel to Sue for Retaliatory Discharge, 11 Geo. J. Legal Ethics 665 (1998); Nancy J. Moore, Conflicts of Interest for In-house Counsel: Issues Emerging from the Expanding role of the Attorney-Employee, 39 S. Tex. L. Rev. 497 (1998); Michael P. Sheehan, Retaliatory Discharge of In-house Counsel: A Cause of Action – Ethical Obligations v. Fiduciary Duties, 45 DePaul L. Rev. 859 (1996); Sally R. Weaver, The Randolph w. Thrower Symposium: The Role of the General Counsel: Perspective: Ethical Dilemmas of the Corporate Counsel: A Structural and Contextual Analysis, 46 Emory L.J. 1021 (1997)

Silo v. CHW Med. Found., 45 P.3d 1162 (Cal. 2002)

The Supreme Court held that no fundamental and substantial public policy prohibits a religious employer from terminating an employee because of his/her objectionable religious speech in the workplace. Here, a Catholic hospital instructed plaintiff that he should not use the word "God … unless it's off the clock." Eventually, plaintiff was terminated for preaching to fellow employees at work.

McGarrity v. Berlin Metals, Inc., 774 N.E.2d 71 (Ind. Ct. App. 2002)

The Court of Appeals held that an employee stated a wrongful discharge cause of action, alleging he was fired for refusing to incur personal liability for felony fraud by filing a fraudulent

tax return and by intentionally preparing financial statements that understated the company's liabilities. At the start of the court's opinion, the court stated:

> "With the sole exception of the war on terrorism, no issue dominates current thought more than the corporate and accountancy ethical scandals which have rocked our country. Insider trading, overstated corporate earnings, shredded documents, and a host of related issues dominate the national news, business journals, and law reviews. It is within this societal framework that the case now before us for decision must be judged." Id. at 74.

Vorpagel v. Maxell Corp. of America, 775 N.E.2d 658 (Ill. App. Ct. 2002)

Employee was fired for reporting to the prosecutor incriminating statements made by a supervisor about a sexual relationship with the supervisor's minor daughter. The court held that the importance of enforcing the state's criminal laws apply with equal force whether or not the alleged crime is connected with a plaintiff's employment

Harvey v. Care Initiatives, Inc., 634 N.W.2d 681 (Iowa 2001)

The court held that no cause of action in tort for retaliatory termination of employment exists for an independent contractor. This is the holding of most courts that have addressed the issue. See Driveaway & Truckaway Serv., Inc. v. Aaron Driveaway & Truckaway Co., 781 F.Supp. 548, 551-52 (N.D. Ill. 1991); Sistare-Meyer v. YMCA, 58 Cal.App.4th 10, 14, 17, 67 Cal.Rptr.2d 840, 842, 844 (1997); Ostrander v. Farm Bureau Mut. Ins. Co., 123 Idaho 650, 851 P.2d 946, 949 (1993); New Horizons Elecs. Mktg., Inc. v. Clarion Corp., 203 Ill.App.3d 332, 336-37, 149 Ill.Dec. 5, 561 N.E.2d 283, 285 (1990); Wilmington v. Harvest Ins. Cos., 521 N.E.2d 953, 956 (Ind.Ct. App. 1988) (dicta); MacDougall v. Weichert, 144 N.J. 380, 388, 677 A.2d 162, 166 (1996); see also Birchem v. Knights of Columbus, 116 F.3d 310, 315 (8th Cir. 1997) (N.D. law); McNeill v. Sec. Benefit Life Ins. Co., 28 F.3d 891, 893 (8th Cir. 1994) (Ark. Law). But see Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 12-14 (1st Cir. 1999) (statute sufficiently broad to include independent contractors); Marquis v. City of Spokane, 130 Wash.2d 97, 112-13, 922 P.2d 43, 51 (1996) (same).

Watson v. Peoples Sec. Life Ins. Co., 588 A.2d 760 (Md. 1991)

The court held that a tort may lie when an employee is fired in retaliation for bringing suit against a superior whose workplace sexual harassment culminates in assault and battery. Such conduct contravenes not only Title VII, but also "the individual's interest in preserving bodily integrity and personality" and "the state's interest in preventing breaches of the peace."

Insignia Residential Corp v. Ashton, 755 A.2d 1080 (Md. 2000)

The court recognized that a wrongful discharge claim may lie where an employee is fired because she resists quid pro quo sexual advances that amount to an invitation to engage in prostitution.

Lewis v. Forest Pharms., Inc., 217 F.Supp.2d 638 (D. Md. 2002)

The court, while recognizing the holdings in Watson and Insignia, found that no causal nexus linked plaintiff's reaction to the assault to her ultimate discharge. The court held that plaintiff was not fired because the she rebuffed the alleged harasser's advances or because she sought to redress his misconduct through her complaint, but rather because, after an eight month leave of absence, she unreasonably refused to return to work. The court recognized that "[s]ometimes, of course, the facts underlying a discharge constitute both a violation of Title VII and of another mandate of public policy, independent of the anti-discrimination law." Id. at 656. In such circumstances, the court recognized that the terminated employee can sue for wrongful discharge as the tort action reinforces, rather than duplicates, the public policy expressed in Title VII.

Petrovski v. Federal Express Corp., 210 F.Supp.2d 943 (N.D. Ohio 2002)

The court held that, absent state action, a public policy tort claim cannot be based on the public policy embodied in the freedom of speech provisions of the First Amendment and §11, Article 1 of the Ohio Constitution. See also Stephenson v. Yellow Freight Sys. Inc., 1999 WL 969817 (Ohio App. 10/26/99); Tiernan v. Charleston Area Med. Ctr., Inc., 203 W.Va. 135, 506 S.E.2d 578, 589 (1998) (citing cases). Accord, Barr v. Kelso-Burnett Co., 106 Ill.2d 520, 88 Ill.Dec. 628, 478 N.E.2d 1354, 1357 (1985); Korb v. Raytheon Corp., 410 Mass. 581, 584, 574 N.E.2d 370 (1991); Prysak v. R.L. Polk Co., 193 Mich. App. 1, 483 N.W.2d 629, 634 (1992); Johnson v. Mayo Yarns, Inc., 126 N.C.App. 292, 484 S.E.2d 840, 843 (1997); Drake v. Cheyenne Newspapers, Inc., 891 P.2d 80, 82 (Wyo. 1995); see also *David C. Yamada, Voices From the Cubicle; Protecting and Encouraging Private Employees Speech in the Post-Industrial Workplace*, 19 Berkeley J. Emp. & Lab. L. 1, 22 (1998) ("In arguing for protection of private employee speech under the public policy exception, advocates and commentators have turned to the First Amendment and its state counterparts as the requisite sources of public policy. This argument, however, has had little success in the courts."); Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 Ohio St. L.J. 341, 391 (1994) ("The prevailing view is that the First Amendment cannot be the basis of a public policy exception in wrongful discharge claims in the absence of state action."). Only one case holds that the First Amendment and its state counterpart embody public policy sufficient to support a wrongful discharge action against a private employer. Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983). In Novosel, the court stated that "an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities," and that the "protection of important political

freedoms … goes well beyond the question whether the threat comes from state or private bodies." Id. at 900. In a subsequent case, however, the Pennsylvania Supreme Court refused to adopt the broad holding in Novosel. See Paul v. Lankenau Hosp., 524 Pa. 90, 569 A.2d 346, 348 (1990); see also Bingham, supra, at 350 n. 39 ("Novosel has been described as the most far-reaching extension of the public policy doctrine and as a dramatic break with precedent because prior cases had unanimously required that government action be present in order for a constitutional violation to exist.").

Bleich v. Florence Crittenton Servs. of Baltimore, Inc., 632 A.2d 463 (Md. Ct. Spec. App. 1993)

The court, held, as it did in Miller v. Fairchild Indus., 629 A.2d 1293 (Md. 1993), that a discharge by a private employer in retaliation for plaintiff's exercise of her free speech rights fails to state a wrongful discharge claim, relying on the free speech guarantees of the Maryland and federal constitutions. The court went on to find that plaintiff's allegations that she, a teacher at a licensed residential child care facility, was fired for sending a letter to the state licensing authorities, which she alleged was a report of abuse or neglect, stated a wrongful discharge claim.

Storey v. Patient First Corp., 207 F.Supp.2d 431 (E.D. Va. 2002)

The plaintiff failed to identify a specific Virginia statute as the basis for his wrongful termination claim. He did identify a federal statute, the False Claims Act, but the court held that a wrongful termination claim must be based on a state statute. See also McCarthy v. Texas Instruments, Inc., 999 F.Supp. 823, 829 (E.D. Va. 1998) ("such a claim must find root in a *state* statute [ ]"; it cannot have its genesis in an act of Congress"); Oakley v. May Dept. Stores, 17 F.Supp.2d 533, 536 (E.D. Va. 1998) (the wrongful termination exception to the at-will doctrine "is predicated on public policies derived from Virginia statutes, not federal laws.").

Chavez v. Sievers, 43 P.3d 1022 (Nev. 2002)

Court held that "[o]nce the legislature determined that small business should not be subject to racial discrimination suits, we decline to create an exception to the at-will doctrine for alleged racial discrimination at these businesses." See also Jennings v. Marralle, 876 P.2d 1074 (Cal. 1994); Brown v. Ford, 905 P.2d 223, 228 (Okla. 1995); Burton v. Exam Ctr. Indus. & General Med., 994 P.2d 1261 (Utah 2000).

Jennings v. Marralle, 876 P.2d 1074 (Cal. 1994)

The Supreme Court held that a wrongful termination claim would not lie against an employer of fewer than five persons as such employers were exempt from the state anti-discrimination law. Accord: Gottling v. P.R., Inc., 61 P.3d 989 (Utah 2002) (Supreme Court

rejected wrongful discharge claim against small employers exempted from the Utah Anti-Discrimination Act on preemption grounds, distinguishing Molesworth on that ground). In contrast, Maryland has held that a wrongful termination claim can proceed against an exempt employer. Molesworth v. Brandon, 672 A.2d 608 (Md. 1996) (Maryland's anti-discrimination law (Article 49B) does not provide for a private cause of action.) The court stated that a wrongful discharge claim could be pursued against an employer exempted as a small business under Article 49(B), § 15(b). The court held in Makovi v. Sherwin-Williams Co., 540 A.2d 494 (Md. 1988) *aff'd*, 561 A.2d 179 (Md. 1989) that a wrongful discharge will not lie against covered employer). See also, Huberts v. Dudley, 993 P.2d 901 (Wash. 2000) (wrongful discharge claim can be pursued against exempt employer).

Wior v. Anchor Indus., Inc., 669 N.E.2d 172 (Ind. 1996)

The Supreme Court held that an employee did not state a valid cause of action where he claimed that his employment was terminated because he refused to terminate a subordinate for filing a worker's compensation claim. The court held that the interest at stake is adequately protected by the terminated employee's cause of action.

Rowan v. Tractor Supply Co., 559 S.E.2d 709 (Va. 2002)

The Supreme Court held that plaintiff's complaint did not state a wrongful discharge claim based on plaintiff's allegation that her employer terminated her employment because she refused to yield to her employer's demand that she discontinue pressing criminal charges of assault and battery against a fellow employee.

Wiles v. Medina Auto Parts, 773 N.E.2d 526 (Ohio 2002)

The Supreme Court's plurality opinion held that, as the remedies provided by the FMLA are adequate, the jeopardy element of a wrongful discharge claim has not been satisfied, i.e., there is no need to recognize a common-law claim because there already exists a statutory remedy that adequately protect society's interests. The court also stated that the FMLA remedies may be exclusive. 773 N.E.2d at 535 n. 4. See also Johnson v. Honda of America Mfg., Inc., 221 F.Supp.2d 853 (S.D. Ohio 2002). Accord: Hamros v. Bethany Homes & Methodist Hosp., 894 F.Supp. 1176, 1178-79 (N.D. Ill. 1995) (no retaliatory discharge claim for plaintiff fired for exercising his rights under the FMLA since the FMLA already prohibits retaliation). But see Danfelt v. Board of County Commissioners of Washington County, 998 F.Supp. 606 (D.Md. 1998) (court permitted the employee to assert a wrongful discharge claim based on the FMLA, finding that the FMLA's savings clause does not evince an intent to completely preempt state law causes of action, and that Maryland's law of wrongful discharge does not conflict with the FMLA.)

Mitchem v. Counts, 523 S.E.2d 246 (Va. 2000)

The Supreme Court held that an insurance marketing representative who alleged she was sexually harassed by her boss may proceed with a wrongful discharge claim in violation of the public policy embodied in state laws against fornication, and lewd and lascivious behavior. The court, over a dissent, distinguished Conner v. National Pest Control Ass'n, 513 S.E.2d 398 (Va. 1999) which had held that the Virginia Human Rights Act barred wrongful discharge claims "based on any public policy which is reflected in the VHRA, regardless of whether the policy is articulated elsewhere." In Mitchem, the majority held that the Conner holding did not bar claims for wrongful discharge in violation of public policies not reflected in the VHRA, even if the challenged conduct also violates a VHRA policy. The federal district court subsequently set forth its understanding of the reasoning underlying Mitchem by saying that the plaintiff in Mitchem "was within the protective reach of both statutes ... because she was arguably under a legal duty, imposed upon her by statutes, to refrain from doing what her superior wanted her to do, namely to engage in fornication and lewd and lascivious conduct." Anderson v. ITT Indus., Corp., 92 F.Supp.2d 516, 522 (E.D. Va. 2000).

Anderson v. ITT Indus., Corp., 92 F.Supp.2d 516 (E.D.Va. 2000)

Virginia's wrongful termination case law, the so-called Bowman doctrine, was summarized by the federal district court as follows:

> "[W]hile all Virginia statutes [ ] reflect a Virginia public policy to some degree, 'termination of an employee in violation of the policy underling any one of them does not automatically give rise to a ... cause of action for wrongful discharge.' (citation omitted). Instead, statutes embodying a public policy sufficient to form the basis of a wrongful discharge claim fall into two categories. (citations omitted.) The first is a statute stating explicitly that it expresses a public policy of the Commonwealth. (citation omitted). The second, far more common category consists of statutes that do not explicitly state a public policy, but rather 'are designed to protect the property rights, personal freedoms, health, safety or welfare of the people in general,' and thereby further an underlying, established public policy that is violated by the discharge at issue. (citations omitted). Yet, even if a statute falls within one of these categories, it may not serve as the basis of a Bowman claim, unless the aggrieved employee also shows that he or she is a member of the class of individuals the public policy is intended to benefit. (citations omitted). In other words, to state a *Bowman* claim, the discharged employee must show that he or she 'fell within the protective reach of the statute which supplied the public policy component of his or her claim.' Leverton v. AlliedSignal, Inc., 991 F.Supp. 486, 493 (E.D.Va. 1998)." 92 F.Supp.2d at 520-21.

Dray v. New Mkt. Poultry, Inc., 518 S.E.2d 312 (Va. 1999)

The court rejected a wrongful termination claim where the plaintiff, a quality control inspector, alleged that she was terminated after she informed a government inspector that the employer's product was adulterated in non-compliance with the Virginia Meat and Poultry Products Inspection Act. In doing so, the court reasoned as follows:

> "The Act upon which this plaintiff relies does not confer any rights or duties upon her or any other similarly situated employee of the defendant. Instead, the Act's objective is 'to provide for meat and poultry product inspection programs that will impose and enforce requirements with respect to intrastate operations and commerce.' Code § 3.1-884.19. The plaintiff identifies two of the Act's provisions that she says articulate a public policy allowing her to evade the employment-at-will doctrine. She relies upon Code § 3.1-884.22, which forbids intrastate distribution of uninspected, adulterated, or misbranded meat and poultry products. She also relies upon Code § 3.1-884.25(2), which establishes criminal penalties for any person who 'resists, ... impedes, ... or interferes' with state meat inspectors. These provisions do not secure any rights this plaintiff, nor do any other provisions of the Act. Rather, the Act establishes a regulatory mechanism directed only to government inspectors and industry management."

518 S.E.2d at 455.

Simonson v. Trinity Reg'l Health Sys., 221 F.Supp.2d 982 (N.D. Iowa 2002).

The court, as had the Iowa Court of Appeals in McMahon v. Mid-America Constr. Co. of Iowa, 2000 WL 1587952 (Iowa App. Oct. 25, 2000), declined to decide whether Iowa recognizes a claim for wrongful failure to rehire in retaliation for seeking workers' compensation benefits. The court stated that it believed it is "likely" that Iowa would recognize such a claim.

Brandon v. Anesthesia & Pain Mgmt. Assocs., LTD, 277 F.3d 936 (7th Cir. 2002)

The court found that an Illinois wrongful discharge claim could be based on federal law, i.e., those federal statutes that criminalize Medicare fraud. Interestingly, Judge Wood, in dicta, stated that under the Supremacy Clause, the state is "required to treat federal law on a parity with state law, and thus it is not entitled to relegate violations of federal law or policy to second class citizenship." The court then went on to reject the lower court's alternative holding that the anti-retaliation provisions of the federal False Claims Act bar plaintiff's claim. The court reasoned that because plaintiff only notified the shareholders of his concerns about illegal billing practices, and because such conduct did not constituted protected activity under the FCA (see e.g., United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 736 (D.C. Cir. 1998); Zahodnick v. Int'l Business Machines Corp., 135 F.3d 911, 914 (4th Cir. 1997)) as such actions were not "In furtherance of 'a qui tam action' and because Illinois does not require an employee to report illegal conduct to authorities for there to be a basis for a retaliatory, wrongful discharge claim

(Lanning v. Morris Mobile Meals, Inc., 720 N.E.2d 1128 (Ill. 1999)), the plaintiff could pursue the wrongful discharge claim. The court further held that there is nothing in the FCA to suggest that Congress intended to preempt retaliatory discharge claims based on allegations of fraud on the government. Finally, the court stated that even if there was some kind of federal remedy available under the FCA, that is "one of many factors in a pragmatic approach toward determining when the tort of retaliatory discharge will lie" and Illinois "seems to take a more exacting approach to the availability of an alternative remedy" than the federal courts do in comparable situations, e.g., Bivens actions.

Lanning v. Morris Mobile Meals, Inc., 720 N.E.2d 1128 (Ill. 1999)

Illinois wrongful discharge claim can proceed where employee did not report illegal conduct to authorities, but only to employer. 720 N.E.2d at 1130-31.

Ghorbanni v. North Dakota Council on the Arts, 639 N.W.2d 507 (N.D. 2002)

The court held that an action for retaliatory discharge in violation of public policy is a tort. The court collected authorities so holding.

Symeonidis v. Paxton Capital Group, Inc., 220 F.Supp.2d 478 (D. Md. 2002)

Plaintiff complained about defendant's failure to pay minimum wage and to pay compensation due to him. Plaintiff alleged he was fired on account of his complaints, and plaintiff filed a wrongful termination claim. The court granted summary judgment to the defense, relying on Chappell v. Southern Maryland Hosp., 578 A.2d 766 (Md. 1990) and Makovi v. Sherwin-Williams Co., 561 A.2d 179 (Md. 1989), on the ground that other civil remedies were available. See also Jones v. Giant Food, Inc., 2000 WL 1828283 (D. Md. 2000) (Makovi barred wrongful discharge claim based on anti-discrimination law which provided a statutory remedy); Orci v. Insituform East, Inc., 901 F.Supp. 978 (D. Md. 1995) (court held that because Title VII provides its own remedies for the type of behavior of which plaintiff complains, no claim for wrongful discharge lies); Chappell v. Southern Md. Hosp., Inc., 578 A.2d 766 (Md. 1990) (Court of Appeals held that existence of statutory federal and state remedies for a discharge of an employee in retaliation for reporting illegal employment discrimination and violations of state and federal minimum wage laws precluded a wrongful discharge claim).

Porterfield v. Mascari, 788 A.2d 242 (Md. 2002), aff'd, 823 A.2d 590 (Md. 2003)

Court of Special Appeals declined to recognize a wrongful termination claim where plaintiff alleged she was terminated for seeking to consult with an attorney before signing a written warning of inadequate job performance. The court held that, without more, being fired for exercising the general right to consult counsel is not enough. The court went on to say that "[t]he conduct of the employer and the nature of the potential claim, if any, are relevant." The court emphasized that Watson had held that there ordinarily is no violation of public policy when an employer discharges an at-will employee in retaliation for the employee having sued the employer and that there was nothing in the instant case "to take this case out of the general rule expressed in Watson --- not even the type of conduct discussed in the Watson dissent, i.e., conduct that would constitute an intense personal affront to an employee." The court distinguished cases from other jurisdictions on that basis. Thompson v. Coborn's Inc., 871 F.Supp. 1097 (N.D. Iowa 1994); Chapman v. Adia Servs., Inc., 688 N.E.2d 609 (Ohio 1997); Simonelli v. Anderson Concrete Co., 650 N.E.2d 488 (Ohio 1994). The Maryland Court of Appeals affirmed the decision of the Court of Special Appeals in May 2003, holding that "there [was] no sufficiently clear mandate of public policy" that had been violated. Judge Eldridge wrote a dissenting opinion, to which Chief Judge Bell and Judge Raker joined, stating that "one has a right to seek advice of his or her attorney being forced to sign an important document." Porterfield, 823 A.2d at 611.

McKay v. Ireland Bank, 59 P.3d 990 (Idaho Ct. App. 2002)

The Idaho Court of Appeals rejected a wrongful discharge claim where plaintiff, an at-will employee, alleged she was terminated after she told her employer that she planned to run for political office, county treasurer. The defendant bank had a policy requiring any employee running for public office to resign two weeks before the election. The court said it "cannot say [the plaintiff's] interest in running for political office outweighs the bank's interest in avoiding being associated with partisan politics and the potential negative effects on its business operations." See also Shovelin v. Cent. New Mexico Elec. Coop. Inc., 850 P.2d 996 (N.M. 1993) contra: Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo.Ct.App. 1985).

Feliciano v. 7-Eleven, Inc., A Corporation, 559 S.E.2d 713 (W. Va. 2001)

An at-will employee of a nationwide convenience store chain was terminated after he violated the company's policy against employees subduing or otherwise interfering with a store robbery, by grabbing and disarming a would-be robber, and then restraining her until the police arrived. In West Virginia, an employer's absolute right to discharge an at will employee is subject to an exception where a substantial public policy principle is contravened by termination. In answering a certified question from the Northern District of West Virginia as to whether the right of self-defense fell within the substantial public policy exception to the at-will employer rule, the Supreme Court of West Virginia answered the question in the affirmative, holding that the self-defense right is an entrenched substantial public policy that may be extended to one's

place of employment, stating that "in defending himself, his family or his property from the assault of an intruder,…his right to stand his ground in defense thereof without retreating extends to his place of business…." Feliciano, 559 S.E.2d at 723.

Union Underwear Company v. Barnhart, 50 S.W.3d 188 (Ky. 2001)

The Supreme Court of Kentucky reversed a judgment against a defendant employer in an age discrimination action, holding that the Kentucky Civil Rights Act did not permit extraterritorial application and that an employer with a headquarters in Kentucky was not subject to the act with respect to an employee working in another state. The presumption in Kentucky is that a statute is only meant to apply within its borders unless the statute evinces a contrary intent. The explicit language of the statute tended to show that the Act was meant to specifically protect individuals within the state of Kentucky and there was no language authorizing application to other jurisdictions. The court further stated that the Kentucky Civil Rights Act would be "running afoul" of the Commerce Clause, which disables a state statute from governing that which occurs wholly outside its own borders. Chief Justice Lambert of the Kentucky Supreme Court dissented, stating that the majority's reliance on the language discussing the protection of individuals within Kentucky represented a "tortured reading" of the KCRA that failed to acknowledge other provisions that provided explicit protections for any individual employed by an employer within the state. The dissent also noted that the majority's opinion thwarted the public policy of both the state and the federal government by denying a jury award of a million dollars in an age discrimination case and overturned a unanimous panel opinion in the intermediate appellate court.

Wounaris v. West Virginia State College, 2003 WL 21057353 (W.Va. 2003)

The Supreme Court of Appeals of West Virginia reversed a jury award for the defendant employer school and remanded the case to the lower court where the plaintiff claimed he had was improperly terminated a second time even though the grievance process at the University had not yet been exhausted and even after an administrative law judge had reinstated him pursuant to a default judgment based on a claim for reverse discrimination after an initial termination. An employer's right to terminate an employer at will is termpered by substantial public policy principles, one of which is the substantial public policy against reverse racial discrimination. The lower court improperly neglected to instruct the jury to presume an improper motive for termination based upon the prior default judgment by the Administrative Law Judge. The court clearly stated that it was not holding that any employee who files a grievance or wrongful discharge is immune from termination, but that an employer must give a persuasive reason for terminating an employee in spite of both a reinstatement order and a still-active grievance process. Justice Stracher, joined by Justice Davis, dissented stating that the jury had every opportunity to determine whether the plaintiff had been treated unfairly.

Lewis v. Nationwide Mutual Insurance, Co., 2003 WL 1746050, 19 IER Cases 1470 (D. Conn. 2003)

The court denied a motion to dismiss claims for wrongful discharge and intentional infliction of emotional distress, pursuant to Federal Rule 12(b)(6). The plaintiff, a member of the Connecticut Bar, claimed that his discharge was wrongful, even though his employment contract was at-will, because he would have been required to violate the Rules of Professional Conduct to engage in the duties that his employer asked of him. The court held that since such conduct on the part of the employer could be construed as against public policy, it could therefore be an exception to the presumption of at-will employment. Further, where plaintiff's office was fired on the eve of a Christmas vacation, his office was broken into, money was stolen, and his furniture was dumped on the front lawn by a moving company, all in violation of his agreement with Nationwide to retrieve his belongings after his vacation, a claim for intentional infliction of emotional distress could be stated.

Jackson v. Morris Communication Corp., 657 N.W.2d 634 (Neb. 2003)

The Supreme Court of Nebraska held that under the public policy exception to the at-will doctrine that an employee can state a claim for wrongful discharge and that an action for retaliatory discharge when an employee has filed a workers' compensation claim fell within this public policy exception, because the Nebraska Workers' Compensation Act presented a "clear mandate of public policy" that warranted application of the exception.

Fosmo v. State, 59 P.3d 105 (Wash. 2002)

The court held that there is no public policy prohibiting terminated employees from participating in an employee advisory service program or the dismissal of those who violate the terms of their reinstatement agreement.

Silva v. Am. Fed'n of State, County, and Mun. Employees, 37 P.3d 81 (N.M. 2001)

The New Mexico Supreme Court held that an employee who could only be fired for cause was not an at-will employee and therefore could not state a claim for the tort of retaliatory discharge in New Mexico, which had been created as an exception to the at-will employment doctrine. The court further held that for employees who could only be fired for just cause still had an alternative cause of action where their employment contract had been breached by a wrongful termination, but that the analysis with respect to retaliatory discharge for just cause employees and for at-will employees are distinct from one another.

Defamation

Varian Medical Systems v. Delfino, 6 Cal.Rptr.3d 325 (Cal. App. 6 Dist. 2003), review granted 10 Cal.Rptr. 536 (Cal. 2004)

The California Court of Appeal in a decision that will be reviewed by the California Supreme Court held that defendants could indeed be found liable for defamation, invasion of privacy, breach of contract and conspiracy, where the two former employees posted disparaging messages regarding their former employees on the internet and were sued by their former company. While the appellate court did affirm a trial level jury award, it did reverse a portion of an injunction imposed by the lower court decision which prohibited future defamatory actions, as "prohibiting future speech is an impermissible prior restraint" under the United States and California constitutions. The appellate court also upheld the trial court's denial as untimely of the defendant's motion to strike the defamation complaint as a strategic lawsuit against public participation (anti-SLAPP motion). The fact that the defendants appealed the denial of the motion was irrelevant to the defamation claims and therefore the lower court had subject matter to continue trying those claims on the merits, even as the anti-SLAPP denial was under appeal. However, as is acknowledged in People ex rel. Lockyer v. Brar, 9 Cal.Rptr.3d 844 (Cal. App. 4th Dist. 2004), the California Supreme Court may overturn this portion of the decision, as it is in conflict with other California jurisprudence on the issue).

Carter v. Aramark Sports and Entertainment Services, Inc., 153 Md. App. 210 (Md. 2003), cert. denied, 2004 Md. LEXIS 143 (2004)

The Court of Special Appeals affirmed summary judgment for the defendants where a former baseball park usher sued for among other things malicious prosecution, interference with economic relations, and defamation. The plaintiff was charged with theft, specifically for stealing frozen yogurt from her defendant-employer. The plaintiff was acquitted of the charges and then sued for the above claims. Summary judgment for the defendant on the malicious prosecution and related claims were upheld, because there was a reasonable ground of suspicion constituting probable cause. Similarly, there was no liability for tortious interference or defamation where the otherwise defamatory statement was published in good faith in furtherance of the defendant's legitimate interests.

American Communications Network, Inc. v. Williams, 568 S.E.2d 683 (Va. 2002)

The court reversed a $500,000 verdict in a defamation action based on a private placement memorandum distributed to some 20 energy companies. The memorandum described two reasons why it had replaced ACN Energy's prior management. The Supreme Court found that the alleged defamatory statements to be either true or statements of opinion.

McNamee v. Jenkins, 52 Mass.App.Ct. 503, 754 N.E.2d 740 (Mass. App. Ct. 2001)

Plaintiff, a sergeant in the police department, supervised a Japanese-American patrol officer who filed a grievance against plaintiff, accusing him of racial discrimination. The grievant submitted a statement during the investigation alleging that plaintiff uttered a racial slur directed at grievant and that plaintiff filed a false report stating that the patrol officer's cruiser was parked in an inappropriate location while on patrol. The court found that the actual malice requirement was satisfied as there was a question of credibility (conflicting testimony) on the issue of falsity. Accordingly, the court denied summary judgment.

Baker v. D.C., 785 A.2d 696 (D.C. 2001)

Employee sued for defamation arising out of a memorandum sent to the head of the agency in which it was stated that she had had an affair with the then Executive Director of the Department and subsequently a promotion request was sent forward for her. The court held that the employee's exclusive remedy was a grievance under the Comprehensive Merit Personnel Act. See also Robinson v. District of Columbia, 748 A.2d 409 (D.C. 2000); Stockard v. Moss, 706 A.2d 561 (D.C. 1997); District of Columbia v. Thompson, 593 A.2d 621 (D.C. 1991). In King v. Kidd, 640 A.2d 656 (D.C. 1999), the court held that an IIED claim, which had sexual harassment as its foundation, did not fall within the scope of the CMPA.

Affolter v. Baugh Constr. Oregon, Inc., 51 P.3d 642 (Or. Ct. App. 2002)

Plaintiff, a sheet metal worker on a construction project, was supervised by a project superintendent. The two did not get along and the superintendent wanted plaintiff transferred from his supervision. The superintendent was overheard to state that plaintiff had had "too much to drink." As a consequence of that accusation, plaintiff was transferred. Plaintiff sued for defamation, the trial court granted summary judgment on the ground that the utterance was a statement of opinion. The Court of Appeals reversed, holding that the statement was capable of a per se defamatory meaning as it attacked a person in his professional or employment capacity. The court found that the statement implied underlying facts that plaintiff had been drinking before coming to work and that he was intoxicated on the job.

Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573 (Tex. 2002)

The Supreme Court found that a supervisor's lies about a subordinate during the employer's workplace investigation were actionable defamation, but that they were not made in the course and scope of his employment as he lied to the company and did not lie for the company.

Tacka v. Georgetown Univ., 193 F.Supp.2d 43 (D.D.C. 2001)

Plaintiff sued in defamation for the publication of accusations of plagiarism to the departmental rank and tenure committee and others in the university community. The university, relying on the Farrington v. Bureau of Nat'l Affairs, Inc., 596 A.2d 58 (D.C. 1991) line of cases, argued that it was protected by absolute privilege because plaintiff consented to publication of an evaluation of articles he published in professional journals and implicitly consented, under the terms of the faculty handbook, to the publication of the evaluation to the rank and tenure committee. The court rejected defendant's argument, finding that the Court of Appeals in Wallace v. Skadden, Arps, Meagher & Flom, 715 A.2d 873 (D.C. 1998) not only distinguished the Farrington line of cases on the basis of whether an employee has consented to the evaluation in contract or through an affirmative act of consent, but also questioned whether the absolute privilege should apply at all in cases where the alleged defamation goes far beyond criticism of an employee's work performance and a substantial question exists as to malice or excessive publication. The court then found that summary judgment on the question of excessive publication and malice was inappropriate based on the record, emphasizing that the question of malice is a question of fact for the jury.

Lewis v. Forest Pharms., Inc., 217 F.Supp.2d 638 (D. Md. 2002)

The court denied summary judgment to the defendant on a defamation claim arising out of a warning letter that stated plaintiff was unable to sell defendant's products effectively and unable to behave professionally toward other employees. The court found that statement is capable of conveying a per se defamatory meaning. Recognizing that communications arising out of the employer-employee relationship enjoy a qualified privilege, the court found that the plaintiff had shown, at least by a preponderance of the evidence, that defendants acted with malice. The court noted that while it is clear that plaintiff to get presumed damages must make the showing by clear and convincing evidence, the Maryland Court of Appeals has not articulated the burden of proof that a plaintiff must satisfy to defeat a qualified privilege on the basis of malice.

Woodfield v. Providence Hosp., 779 A.2d 933 (D.C. 2001)

The Court of Appeals held that an employee who signed a release, permitting her potential employer to perform a background check with her former employers, does not have a claim for defamation regarding statements made by a former employer during the course of the background check.

James v. DeGrandis, 138 F.Supp.2d 402, 420-21 (W.D. N.Y. 2001)

The court denied summary judgment on libel claims where defendant threatened to send defamatory letter and anonymous defamatory letter was sent.

Collins v. Red Roof Inns, Inc., 248 F.Supp.2d 512 (S.D.W.Va. 2003)

The West Virginia Supreme Court held in response to a certified question from a lower court that a party to a dispute is indeed absolutely privileged to publish to an opposing party matter which is defamatory to a third person but related to the proceeding, where no judicial action was currently pending, but where such an action was under serious consideration and contemplated in good faith. The alleged defamatory statements were made after a potential plaintiff asserted that they planned to bring an action against the defendant for payment of certain severance benefits, when the defendant asserted that two third-party employees (the plaintiffs in this particular case) were terminated for causal reasons rather than in the arbitrary and capricious matter intimated by the potential plaintiff's assertion. Because the assertions were made both in good-faith contemplation of litigation and published only to persons with an interest in the prospective proceeding such alleged defamatory statements were absolutely privileged.

Compelled Self-Defamation

Cweklinsky v. Mobil Chemical Co., 297 F.3d 154 (2nd Cir. 2002)

The Second Circuit certified for resolution to the Connecticut Supreme Court the question whether Connecticut recognizes a cause of action for defamation based on an employee's compelled self-publication of the employer's defamatory statements made by the employer only to the employee. The decision collects the authorities recognizing and rejecting such a claim.

Defamation By Conduct

General Motors Corp. v. Piskor, 340 A.2d 767 (Md. Ct. Spec. App. 1975)

The court recognized defamation by conduct where security guards blocked his exit from the plant, grabbed him, surrounded him and shoved him into a guardhouse where he was kept for almost half an hour. The court found that, in light of the guards constantly checking for thieving at the plant, their conduct manifestly conveyed that plaintiff was thought to be a thief. See "*Libel or Slander: Defamation by Gestures or Acts*", 46 ALR 4th 403 (1986). Subsequent to Piskor, the Maryland Court of Appeals in Gay v. William Hill Manor, 536 A.2d 690 (Md. 1988) held that the mere act of an employer escorting an employee from the building after termination of employment, without more, did not constitute a defamatory publication.

Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873 (D.C. 1997)

The court found that the defendants' non-verbal representation that plaintiff had done something disgraceful cannot fairly be characterized as non-defamatory as a matter of law. Defendants had inactivated plaintiff's access key. Plaintiff had alleged that this treatment was ordinarily meted out only to attorneys who had engaged in criminal or unethical activity. The court stated : "The defendant's alleged non-verbal representation (by inactivating the plaintiff's access key and thus effectively locking her out of the office) that she had done something disgraceful cannot fairly be characterized as non-defamatory as a matter of law." 715 A.2d at 878 (footnote omitted). On remand, the trial court entered a summary judgment on the defamation count and plaintiff dismissed an appeal of same. Wallace v. Skadden, Arps, Slate, Meagher & Flom LLP, 799 A.2d 381 (D.C. 2002)

Ivers v. Church of St. William, 1998 WL 887536 (Minn. App. 1998)

Plaintiff alleged that defendant defamed him by deeds that "rise to the level of 'dramatic pantomime'". The Court of Appeals rejected the claim as Minnesota does not recognize claims based on defamation by conduct or dramatic pantomime. See Bolton v. Dept. of Human Servs., 540 N.W.2d 523, 525 – 26 (Minn. 1995) (simple act of escorting plaintiff to the exit door upon his termination with no words spoken did not constitute defamation.); Theisen v. Covenant Medical Ctr., Inc., 636 N.W.2d 74 (Iowa 2001) (same).

Rolsen v. Lazarus, Inc., 2000 WL 1434170 (Ohio App. 2000)

While Ohio is Uebelacker v. Cincom Systems, Inc., 608 N.E.2d 858 (Ohio 1988) has recognized defamation by conduct, the Court of Appeals found that plaintiff's being led through the store by security did not compare to the "extreme, outrageous conduct of the company's employees in Uebelacker."

Assault and Battery

Joyner v. Sibley Mem'l Hosp., 826 A.2d 362 (D.C. 2003)

The District of Columbia Court of Appeals, in affirming summary judgment for the employer in claims related to employment discrimination, found *inter alia* that verbal reprimands based upon reports that an employee directly violated hospital policy were based on sufficiently legitimate, nondiscriminatory reasons. Further, a claim for assault and battery related to a manager's slamming the door on the hand of the employee as she attempted to lead the office is not material to discrimination claims where there is "nothing in the record to establish that the assault and battery, if it did occur, was the product of discrimination." However, the appellate court did find that the trial court erred in dismissing the employee's assault and battery claims related to this incident, before the Department of Employment Services had completed its disposition.

Johnson v. United States, 1987 WL 15690 *1 (D.D.C. July 31, 1987)

The court held: "Under the District of Columbia law of respondeat superior, an employer may be held vicariously liable for the intentional torts of his employee only where the employee's tortious act grew out [of] a foreseeable job-related controversy and was motivated at least in part by a purpose to serve his principal." See also International Distributing Corp. v. American District Telegraph Co., 569 F.2d 136 (D.C. Cir. 1977); Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976).

Weems v. Federated Mutual Ins. Co., 220 F.Supp.2d 979 (N.D. Iowa 2002)

The court found that whether an assault can be imputed to the employer under the doctrine of respondeat superior is "ordinarily a jury question." 220 F.Supp.2d at 992. In the case before the court, the court rejected a per se rule that intentional torts of an agent cannot be imputed to the employer, holding that "the inquiry in each case is a relatively fact-intensive one requiring a careful analysis of the scope of the alleged conduct in light of that reasonably foreseen by the employer." Id. The alleged assault arose out of a confrontation between a superior and a marketing representative when the superior discovered that the subordinate was surreptitiously taping their conversation. The court held it was reasonably foreseeable that "the fulfillment of [the superior's] duties would encompass potentially heated interactions with marketing representatives felt to be underperforming." 220 F.Supp.2d at 993. Accordingly, the court held that it was for the jury to determine whether the superior was acting within the scope of his employment.

Intentional Infliction of Emotional Distress

Larijani v. Georgetown Univ., 791 A.2d 41 (D.C. App. 2002)

The majority found that allegations that defendants deliberately set out to torment plaintiff and continued for a long time by setting up noise making contraption outside the door where she worked survived a motion to dismiss her intentional infliction of emotional distress claim. The concurring judge found it to be a "very, very close case." The dissenting judge found that the result "cheapens the currency of the tort she alleged…"

Martinez v. Cole Sewell Corp., 233 F.Supp.2d 1097 (N.D. Iowa 2002)

The court found that the Iowa Civil Rights Act preempted a claim of intentional infliction of emotional distress. See also Greenland v. Fairtron Corp., 500 N.W.2d 36 (Iowa 1993) (claim for IIED was preempted by Iowa sex discrimination statute).

Jiminez v. Thompson Steel Co., Inc., 264 F.Supp.2d 693 (N.D. Ill. 2003)

The court addressed whether claims for intentional and negligent infliction of emotional distress are preempted by the Illinois Human Rights Act. The court held that whether a tort claim is preempted depends upon whether the claim is inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the act itself.

Thompson v. Jasas Corp., 212 F.Supp.2d 21 (D.D.C. 2002)

Court held that, as the District of Columbia Code does not provide a statute of limitations for a claim of intentional infliction of emotional distress, the three-year residual limitation period applied so long as the claim is not "intertwined with any of the causes of action for which a period of limitations is specifically provided…" Rendall-Speranza v. Nassim, 107 F.3d 913, 920 (D.C. Cir. 1997) (quoting Saunders v. Nemati, 580 A.2d 660, 665 (D.C. 1990). See also, Hunter v. District of Columbia, 943 F.2d 69, 72 (D.C. Cir. 1991). As plaintiff's IIED claim was "intertwined with" her hostile work environment claim under the D.C. Human Rights Act which had a one-year limitations period, plaintiff's claim was restricted to incidents occurring within the one year preceding the filing of the complaint.

Carter v. America Online, 208 F.Supp.2d 1271 (M.D. Fla. 2001)

The court held that even assuming sexual misconduct met Florida's high standard for stating a prima facie case of intentional infliction of emotional distress, AOL could not be vicariously liable as the conduct was not shown to be related to the harasser's job and motivated by a desire to serve his employer.

Williams v. Federal Express, 211 F.Supp.2d 1257 (D. Or. 2002)

While the court recognized that the employer-employee relationship comprised a greater obligation to refrain from inflicting mental distress than the obligation that exists between strangers, there was no evidence that defendant intended or desired to inflict emotional distress, much less that the reprimand, suspensions, and ultimate termination constituted an extraordinary transgression of the bounds of socially tolerable conduct.

Lockamy v. Truesdale, 182 F.Supp.2d 26, 38 (D.D.C. 2001)

The court held that "in an employment context, the proof required to support a claim for intentional infliction of emotional distress is particularly demanding." See also Rogala v. District of Columbia, 161 F.3d 44, 57-58 (D.C. Cir. 1998); Homan v. Goyal, 711 A.2d 812, 818 (D.C. 1998).

Orell v. Umass Mem'l Med. Ctr., 203 F.Supp.2d 52, 70 (D. Mass. 2002)

Defendants' alleged failure to make reasonable accommodations for plaintiff's disability "does not satisfy the stringent standard of a claim for intentional infliction of emotional distress." (collects cases holding that failure to accommodate a disability does not support an IIED claim.)

Biggs v. Aldi, Inc., 218 F.Supp.2d 1260, 1262-63 (D. Kan. 2002)

The court, recognizing that the Kansas courts have set a very high standard for an IEED claim and "have been reluctant to extend the cause of action to discrimination … claims" (Boe v. Allied Signal, Inc., 131 F.Supp.2d 1197, 1205 (D. Kan. 2001)), the court rejected an IIED claim based on defendant's alleged termination of plaintiff due to race, saying that the Kansas courts have construed the term "outrageous" "so narrowly in the discrimination context (perhaps because other avenues of relief are available for victims of discrimination) …" 218 F.Supp.2d 1263.

Arbabi v. Fred Meyers, Inc., 205 F.Supp.2d 462 (D. Md. 2002)

The court, in rejecting an IIED claim based on harassment, stated: "As inappropriate and repulsive as workplace harassment is, such execrable behavior almost never rises to the level of outrageous, and almost never results in such severely debilitating emotional trauma, as to reach the high threshold invariably applicable to a claim of intentional infliction of emotional distress under Maryland law." 205 F.Supp.2d at 466 (collects Maryland cases rejected IIED claims). See also, Hanson v. Hancock County Mem. Hosp., 938 F.Supp. 1419, 1141-42 (N.D. Iowa 1996) (collects over 15 Iowa cases where conduct found insufficiently outrageous as a matter of law and noting that "[f]ew cases can be located where an Iowa court actually held the conduct alleged was sufficiently outrageous").

Walton v. Johnson & Johnson Servs., Inc., 203 F.Supp.2d 1312, 1327-28 (M.D. Fla. 2002)

The court held that the employer was not vicariously liable for the employee's intentional and violent acts (e.g. rape) because there was no evidence that the conduct was in furtherance of the business interests of the employer.

Leone v. New England Communications, 2002 WL 1008470, 32 Conn.L.Rptr. 72 (Conn. Super. 2002)

In light of Perodeau, the court struck a negligent infliction of emotional distress claim as it did not arise in the course of termination of the plaintiff-employee who continued to be employed by the defendant. The court denied the motion to strike an IIED claim in light of the alleged facts and the public policy prohibiting discrimination in the workplace. The complaint

alleged that the company's owners referred to the plaintiff, using racial slurs about his Italian ancestry, placed sexually offensive comments and pictures on his computer and made comments about his genitalia, sexual performance, homosexuality, and the like.

Negligent Infliction of Emotional Distress

Snyder v. Med. Serv. Corp. of E. Washington, 35 P.3d 1158 (Wash. 2001)

"[Some] jurisdictions have found the tort of negligent infliction of emotional distress does not exist in the employment context or, if it does, it is severely limited. See Antalis v. Ohio Dep't of Commerce, 68 Ohio App.3d 650, 589 N.E.2d 429, 431 (1990) ('Ohio courts have not recognized a separate tort for negligent infliction of emotional distress in employment situations."; Herman v. United Bhd. of Carpenters & Joiners, 60 F.3d 1375 (9th Cir. 1995) (Nevada law precludes emotional distress claims in the employment context.); Tischmann v. ITT/Sheraton Corp., 882 F.Supp. 1358 (S.D.N.Y. 1995) (New York law does not permit a former employee to utilize claims for intentional or negligent infliction of emotional distress to avoid the employment at will doctrine.); Armstrong v. Paoli Mem'l Hosp., 430 Pa.Super. 36, 633 A.2d 605 (1993) (Pennsylvania recognized negligent infliction of emotional distress only where the plaintiff is a bystander of where the defendant has a contractual or fiduciary duty.); Parsons v. United Techs. Corp., 243 Conn. 66, 88-89, 700 A.2d 655, 667 (1997) ("[N]egligent infliction of emotional distress in the employment context arises only where it is 'based upon unreasonable conduct of the defendant in the termination process.'" (quoting Morris v. Hartford Courant Co., 200 Conn. 676, 682, 513 A.2d 66 (1986))

Marrs v. Marriott Corp., 830 F.Supp. 274, 284 n. 7 (D. Md. 1992)

The court granted summary judgment for the employer because Maryland does not recognize a claim for negligent infliction of emotional distress.

Kun v. Finnegan, Henderson, Farabow, Garrett & Dunner, 949 F.Supp. 13, 20 (D.D.C. 1996)

The court dismissed employee's claim for negligent infliction of emotional distress because employee did not allege direct physical injury or presence in the zone of physical danger.

Miller v. Bristol-Myers Squibb Co., 121 F.Supp.2d 831, 839 (D. Md. 2000)

Maryland does not recognize an independent claim for negligent infliction of emotional distress. Lapides v. Trabbic, 758 A.2d 1114, 1122 (Md. 2000); Carson v. Giant Food, Inc., 187 F.Supp.2d 462, 482 (D.Md. 2002).

Gupta v. City of Norwalk, 221 F.Supp.2d 282 (D. Conn. 2002)

The court, applying Perodeau, held that a claim of negligent infliction of emotional distress may be brought only where the plaintiff alleges she suffered emotional distress during the termination process and not the ongoing employment relationship. The court recognized that a constructive discharge would satisfy the termination element of the claim. 221 F. Supp.2d 295 n.6.

Negligence

D. Houston, Inc. v. Love, 92 S.W.3d 450 (Tex. 2002)

The Supreme Court held that the Dram Shop Act did not bar independent contractor-dancer's claim of negligence where the night club exercised control over the dancer's decision to consume sufficient alcohol to become intoxicated and dancer was seriously injured in an auto accident while driving home from work.

Harris v. Best Bus. Prods., Inc., 651 N.W.2d 875 (S.D. 2002)

The court held that the employer could be sued for negligence in providing a company van to an employee for deliveries, where the van had not been properly maintained even though the employee's daughter, a trespasser, was driving the van without the company's permission at the time of the accident.

Tricoski v. Lab. Corp. of America, 216 F.Supp.2d 444 (E.D. Pa. 2002).

Plaintiff's employer, pursuant to its random drug testing policy, required that plaintiff be tested by the defendant lab. Based on an erroneous test result finding races of marijuana, plaintiff was terminated. Plaintiff sued the lab for negligence. Finding no Pennsylvania law directly on point, the court concluded that the Pennsylvania Supreme Court would not recognize a duty of care of a testing facility to employees drug-tested at their employer's behest. The decision collects authorities on the issue.

Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003)

The Texas Supreme Court declined to create a duty requiring employers to exercise ordinary care in collecting employee's specimens for drug testing. The Court found that employers who conduct in-house urine specimen collection under the Department of Transportation regulations for random drug-testing of employees owe no duty of care to the employees to conduct the drug test with reasonable care.

Sharpe v. St. Luke's Hospital, 821 A.3d 1215 (Pa. 2003)

The Supreme Court of Pennsylvania reversed the lower court decisions to grant summary judgment against a plaintiff who was terminated after testing positive for cocaine pursuant to a drug test that was allegedly misidentified and mishandled. The lower courts had held that the hospital administering the test owed no duty of care to the plaintiff, but the highest state court held that a hospital owes a duty of reasonable care to an employee of a third party in the handling of a urine specimen in drug testing related to employment.

Brown v. Argenbright Sec., Inc., 782 A.2d 752 (D.C. 2001)

Plaintiff, a customer at grocery store, sued grocery store and security company that provided personnel to work as security guards in the store, pursuant to a contract between the store and the security company. Plaintiff claimed that a security guard, who stopped her on suspicion of shoplifting, in the course of a search, touched her in a sexually improper manner. Plaintiff sued, inter alia, for negligence . The court found on the negligence claim against the security firm – employer, whether the employee's conduct was actuated, at least in part, by a desire to serve the security company's interest, was a question for the jury, stating that "a physical search of a suspected shoplifter, is particularly susceptible to this interpretation …" The court found no evidence of a master-servant relationship between the guard and the grocery store, and thus the respondeat superior claim against the store failed.

Champion Billiards Cafe, Inc. v. Hall, 685 A.2d 901 (Md. App. 1996), cert. denied, 690 A.2d 523 (Md. 1997)

The Court of Special Appeals of Maryland held that an employer had a duty of care to its employee when undertaking to forward an application for insurance on behalf of its employee, based upon the "intimate nexus between the parties" that existed because of, in this particular case, the employment relationship, the fact that the act of forwarding the application was directly related to that relationship, the reliance upon the agreement of the employee, the risk of monetary loss in the event of a failure to complete this act, and the fact that the employer knew of this reliance and this risk. The employer breached this duty and therefore owed damages to the employee.

Negligent Hiring

Holston v. Sports Authority, Inc., 136 F.Supp.2d 1319 (N.D. Ga. 2000), *aff'd* without op., 251 F.3d. 164 (11th Cir. 2001)

The court held that a claim for negligent hiring or retention based upon racial discrimination fails to state a claim under Georgia law, noting that negligence claims can arise only from common

law duties, and there is no common law duty to prevent discrimination in employment. See also Alford v. COSMYL Inc., 209 F.Supp.2d 1361, 1372 (M.D. Ga. 2002).

Wise v. Complete Staffing Servs., Inc., 56 S.W.3d 900 (Tex. App. 2001)

Plaintiff was attacked and severely injured while working at a bakery by a temporary employee performing unskilled manual labor who had been provided to the bakery by a temporary staffing agency. Plaintiff sued the agency for negligent hiring the attacker as it failed to sufficiently investigate his criminal background. The court concluded that the staffing agency had no duty to check the criminal background of its employees unless it was directly related to the duties of the job at hand. But, as the agency had undertaken to do a background check and allegedly performed it negligently, summary judgment on that claim was reversed.

Negligent Retention

Southeast Apartments Mgmt., Inc. v. Jackman, 513 S.E.2d 395, 397 (Va. 1999)

The Supreme Court recognized an independent tort for negligent retention, stating that the "cause of action is based on the principle that an employer … is subject to liability for harm resulting from employer's negligence in retaining a dangerous employee who [sic] the employer knew or should have known was dangerous and likely to harm [others]." The employer cannot be liable unless the employer's employee has committed a cognizable wrong against the plaintiff. In Sutphin v. United American Ins. Co., 154 F.Supp.2d 906 (W.D.Va. 2000), the court dismissed a negligent retention claim because the conduct of defendant's independent contractor, who allegedly subjected plaintiff to sex harassment, was not actionable in its own right under Virginia or federal law. Title VII does not cover independent contractors; Virginia does not provide a separate cause of action for sex harassment; and the contractor did not assault or batter plaintiff, as was the cause in Jackman. The Sutphin court distinguished Call v. Shaw Jewelers, Inc., 1999 U.S. Dist. LEXIS 636 (W.D. Va. Jan. 7, 1999), *aff'd*, 2002 WL 429710 (4th Cir. April 21, 2000) as the employee's conduct in Call was subject to remedial action under Title VII. The Sutphin court noted that it was not deciding whether an underlying wrong that is actionable only under federal law can support a state law negligent retention claim.

Bryant v. Better Bus. Bureau of Greater Maryland, 923 F.Supp. 720 (D.Md. 1996)

The court rejected a claim of negligent hiring based on verbal abuse plaintiff suffered where the abuse was not a cognizable injury under the common law, but rather was only cognizable, if at all, under federal laws barring harassment in the workplace.

Negligent Supervision

Sabb v. South Carolina State Univ., 567 S.E.2d 231 (S.C. 2002)

While the majority decided a worker's compensation exclusivity issue, the dissent questioned whether an employee should ever be allowed to sue her employer on a theory of negligent retention or supervision for the acts of a supervisory employee.

McDaniel v. Fulton County School Dist., 233 F.Supp.2d 1365 (N.D.Ga. 2002)

Among other things, the Northern District of Georgia held that a claim for negligent supervision and retention could not be sustained under Georgia law where a plaintiff could not show physical loss, pecuniary loss, or malicious, willful, and wanton action.

Negligent Discharge

Huegerich v. IBP, Inc., 547 N.W.2d 216 (Iowa 1996)

The Supreme Court rejected a negligent discharge claim. The plaintiff alleged that IBP negligently administered its drug policy by failing to provide an orientation program or advising that an employee could be terminated if caught in possession of look-alike drugs. The court's decision rested on the belief that imposing "a duty of care upon an employer when discharging an employee … would radically alter" the doctrine of employment at-will. 547 N.W.2d at 220.

Negligent Investigation

Theisen v. Covenant Med. Ctr, Inc., 636 N.W.2d 74, 18 IER Cases (BNA) 114 (Iowa 2001)

Plaintiff was discharged by defendant because, after he was suspected of making an obscene phone call to another employee, he refused to submit to voice print analysis to confirm or refute the accusation. The Supreme Court rejected, as a matter of law, plaintiff's claim that defendant owed him a duty of care to conduct a reasonable, non-negligent investigation prior to firing him. The court, in rejecting such a claim, stated: "To allow such a claim would not only contravene this court's denial of a negligent discharge claim in Huegerich, but it would also create an exception swallowing the rule of at-will employment." See also Johnson v. Delchamps, Inc., 897 F.2d 808, 811 (5th Cir. (La.) 1990) (holding that an employer could discharge an at-will employee "for a reason based on incorrect information, even if that information was carelessly gathered."); Morris v. Hartford Courant Co., 200 Conn. 676, 512

A.2d 66, 68 (1986) (rejecting wrongful discharge claim based on negligent investigation of criminal matter as public policy exception to doctrine of at-will employment).

Fraud

Walsh v. Alarm Sec. Group, Inc., 230 F.Supp.2d 623 (E.D. Pa. 2002)

The court denied the employer's summary judgment motion on the prospective employee's fraudulent misrepresentation claim under Pennsylvania law, finding that there was sufficient evidence that the employer misrepresented that it had acquired a sufficient number of existing businesses to open the Philadelphia branch office in order to assure that there would be a branch manager.

Allstate Ins. Co. v. Eskridge, 823 So.2d 1254 (Ala. 2001)

A fractured Supreme Court held that plaintiff failed to establish the reasonable reliance element of a fraud claim, concluding that plaintiff could not have reasonably relied on the employer's statement that he could "just come back to work" to mean that he was authorized to take sick leave of an indefinite and perhaps lengthy period and then return without any limitation on the time he would be away from work and without regard to the condition of his health when he returned.

Negligent Misrepresentation

Griesi v. Atlantic Gen. Hosp. Corp., 756 A.2d 548 (Md. 2000)

The Court of appeals held that a prima facie case of negligent misrepresentation had been pled by a job applicant for a managerial position in defendant's physical therapy department, where the applicant had alleged that the defendant's CEO had negligently misrepresented material facts during the course of pre-employment negotiations upon which he relied to his ultimate detriment. Plaintiff alleged that defendant's CEO communicated an oral offer of employment at a specific salary with a date certain for commencement of employment, which the CEO represented had been approved by the Chairman of the Board. Plaintiff had received job offers from other employers, and had advised defendant that it was weighing its offer against the other offers. After doing so, plaintiff accepted the offer, only to later discover that the CEO had not cleared the hiring of the plaintiff for the position. When plaintiff was not hired, the suit was filed. See also Lubore v. RPM Assocs., Inc., 674 A.2d 547 (Md. 1996) (Court of Special Appeals allows claim of negligent misrepresentation arising out of pre-employment negotiations to proceed).

Armstrong v. American Home Shield Corp., 333 F.3d 566 (5th Cir. 2003)

The Court of Appeals for the Fifth Circuit affirmed a District Court decision that granted summary judgment to a defendant employer, holding that an employer was not required to pay bonuses to employees beyond "actual" costs savings generated as articulated in the contract, that asking the employer to enforce an existing contract provision was not a proposed contractual change that the employer "had not previously adopted" as was required by the contract provision to impose a duty to pay a bonus, that the employees could have discovered the profitability of the corporate division through reasonable care and that therefore the discovery rule tolling the statute of limitations for negligent representation, and that the merger clauses written into their employment contracts were unequivocal disclaimers of reliance, thereby vitiating any fraud claim that the employees may have had.

Privacy

Baughman v. Wal-Mart Stores, Inc., 592 S.E.2d 824 (W. Va. 2003)

The West Virginia Supreme Court rejected plaintiff's claim for invasion of privacy predicated on Wal-Mart's requirement that job applicants provide a urine sample for drug testing. Even though the court had previously held in Twigg v. Hercules Corp., 406 S.E.2d 52 (W.Va. 1990) that requiring incumbent employees to submit to drug-testing was contrary to public policy, the court in Baughman held that "in the pre-employment context, … a person clearly has a lower expectation of privacy." The court went on to further state: "employers regularly perform pre-employment background checks, seek references, and require pre-employment medical examinations, etc., that are far more intrusive than would be considered tolerable for existing employees without special circumstances. Giving a urine sample is a standard component of a medical examination…"

Garrity v. John Hancock Mutual Life Ins. Co., 2002 WL 974676 (D. Mass. 2002)

The court found no actionable invasion of privacy where the employer accessed the plaintiff's office computers, searching for sexually explicit emails from internet joke sites and other third parties, in the course of an investigation triggered by a complaint from a fellow employee. The employer had an email policy which explicitly stated that all information stored, transmitted, received or contained in the company's email system was the property of the company, and that there may be business or legal situations that necessitate the company's review of email messages and that it reserved the right to access all emails. The court found that there was no reasonable expectation that employee's emails were private and even if so, the employer's legitimate business interest in protecting its employees from workplace harassment "would likely triumph plaintiff's privacy interest."

American Fed'n of State, AFSCME v. Grand Rapids Pub. Utils. Comm'n, 645 N.W.2d 470 (Minn. Ct. App. 2002)

The Court of Appeals found that defendant had not violated the Data Practices Act when it released employee's social security numbers in conjunction with a federally-mandated drug and alcohol testing program on the ground that the release was specifically authorized by federal law, i.e., the Omnibus Transportation Employee Testing Act.

Bodah v. Lakeville Motor Express, Inc., 649 N.W.2d 859 (Minn. Ct. App. 2002)

The Court of Appeals found that a class of employees and former employees had stated a claim for invasion of privacy where employer faxed a list of over 200 employee names and social security numbers to trucking terminals in six states. Based upon the state Supreme Court's recognition of the tort of invasion of privacy in Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998), the breadth of the disclosure, and the risk of identity theft, the class representatives had stated a claim.

TBG Ins. Servs. Corp. v. Superior Court of Los Angeles, 117 Cal.Rptr.2d 155, 96 Cal.App.4th 443, 18 IER Cases 545 (BNA) (Cal. 2002)

Court, during discovery in a wrongful termination case, granted motion to compel production of former employee's home computer, which former employer had provided for said employee. Former employee resisted on privacy grounds, emanating from the California Constitution. Court found that waiver signed by employee precluded any reasonable expectation of privacy and that production was not such a serious invasion of privacy such that it could overcome the waiver and the need for information regarding employee's access while at work to sexually explicit websites.

Allstate Ins. Co. v. Ginsberg, 2003 WL 22145227, 28 Fla. L. Weekly S710 (Fla. 2003)

The Florida Supreme Court held that a claim of unwelcome sexual conduct did not state a cause of action for the tort of invasion of privacy. The tort of invasion of privacy, includes "physically of electronically intruding into one's private quarters." The Supreme Court held that this definition referred to a place and not to a body part. "This is a tort in which the focus is the right of a private person to be free from public gaze."

Tortious Interference with Contractual Relations

Futrell v. Dep't of Labor Fed. Credit Union, 816 A.2d 793 (D.C. 2003)

In an opinion by Judge Washington, the District of Columbia Court of Appeals affirmed the trial court decision to grant summary judgment to the defendant-employer on all claims related to her demotion and eventual termination. The court found that where an African-American employee was, by her own admission, unable to "perform her duties as a Manger at an acceptable level," where the employer has already been "taken to task" by its parent agency specifically for "failing to decisively address problems" with the Manager, and where the employee could present no evidence but conclusory statements that she was replaced by younger Caucasian women, there is no pretext for discrimination under the District of Columbia Human Rights Act. The court also found that while an employee handbook could raise a jury question as to whether an implied employment contract existed even in an expressly at-will relationship such as the one in this case, the Employee Handbook here distinguished between "employee" and "manager" and therefore did not apply. Further, when a Guidebook "clearly states in boldfaced print that it 'does not constitute an expressed or implied employee contract'," it cannot be read to imply an employee contract. Given the absence of an express or implied contract, there could be no cognizable claim for tortious interference with employment rights. Intentional infliction of emotional distress was also ruled out as the "mental anguish" averred by the employee was not sufficient to meet the severity standard of the IIED tort.

Mathis v. Liu, 276 F.3d 1027 (8th Cir. 2002)

Plaintiff had an at-will contract with the defendant to solicit orders for its products from retailers. Plaintiff received a 5% commission. Plaintiff entered into a contract with another individual to act as his sub-agent to solicit orders and to be compensated with a 1% commission. This contract specified that it was terminable by either party on six months written notice. Defendant persuaded the sub-agent to breach the contract with plaintiff without providing the six months notice and subsequently contracted with the sub-agent to solicit the orders. Two days after the sub-agent terminated his contract without the required notice, defendant terminated its at-will contract with plaintiff. The court found a tortious interference with contract claim because plaintiff's contract with the sub-agent was not at-will, but held plaintiff could not establish lost profits damages as plaintiff's relationship with defendant was at-will.

Storey v. Patient First Corp., 207 F.Supp.2d 431 (E.D. Va. 2002)

The court denied a motion to dismiss a tortious interference claim where the plaintiff's complaint alleged "the individual defendants were acting in their personal capacity, outside the scope of their employment, and for their own reasons (unrelated to the legitimate interests of Patient First)." 207 F.Supp.2d at 449. The court went on to say that the complaint, fairly read, alleged that the individual defendants "were motivated by an intent to protect themselves from liability of the sort that might ensue incident to Storey's disclosures respecting the corporate

conduct of Patient First." Id. Thus, the individual defendants were acting outside the scope of their employment such that they could be viewed as separate persons (apart from Patient First) for purposes of applying the tortious interference claim. See also, Wuchenick v. Shenandoah Memorial Hosp., Inc., 215 F.3d 1324 (4th Cir. 2000) (unpublished); Warner v. Buck Creek Nursery, Inc., 149 F.Supp.2d 246, 265-66 (W.D. Va. 2001).

Lewis v. Forest Pharms., Inc., 217 F.Supp.2d 638 (D. Md. 2002)

The court held that, even assuming plaintiff's division manager and regional director were acting outside the scope of their authority when they issued a warning letter to plaintiff, the company retroactively authorized their conduct by ratifying it, and thus they could not be liable for interfering with the economic relationship between the principal-employer and the plaintiff. 217 F.Supp.2d at 660-61.

Hegy v. Cmty. Counseling Ctr. of Fox Valley, 158 F.Supp. 2d 892 (N.D. Ill. 2001)

Plaintiff was the 78-year-old executive director of the Center and had been employed by the Center for 32 years. Plaintiff was an at-will employee. Plaintiff alleged that she was discharged in violation of the by-laws which she construed to require the Board's approval of the discharge of the executive director. Plaintiff further alleged that her replacement was less qualified for the position of executive director than she was. The court found that an at-will employee can have a reasonable expectation of continued employment sufficient to sustain an action by tortious interference with employment. The court found that, based on the plaintiff's allegation regarding the violation of the by-laws, plaintiff had sufficiently demonstrated that the corporate officers acted outside the scope of their corporate authority. And, the plaintiff's allegation that her replacement was less qualified then her was sufficient to demonstrate that the defendants acted contrary to the best interests of the corporation. Accordingly, the court denied defendant's motion to dismiss.

Gunthorpe v. Daimler Chrysler Corp., 205 F.Supp.2d 820 (N.D. Ohio 2002)

The court, recognizing that the plaintiff could maintain a tortious interference claim against an employee of a party to the relationship at issue, that is, an employee of the defendant employer, if plaintiff can demonstrate that the employee acted solely in his/her individual capacity and benefited from the alleged interference, granted summary judgment as there was no evidence the employee-supervisor in this case personally benefited from the actions alleged.

Beard v. Edmondson & Gallagher, 790 A.2d 541 (D.C. App. 2002)

In an non-employment case, the court discussed when a cause of action accrues and the continuing tort doctrine. Judge Ruiz, in a concurring opinion, stated:

"Not all continuing violations are the same, however. Where, unlike here, the nature of the violation is such that to claim redress it is necessary to prove sustained conduct, or a pattern and practice, the time when the claim comes into existence can be less than clear. The usual concern about staleness 'disappears' so long as some act that is part of such a continuing violation occurs within the limitations period. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Certain discrimination claims are examples. *See id.*(practice of racial steering under the Fair Housing Act, 42 U.S.C. §§ 3604, 3612(a)); Morgan v. National R.R. Passenger Corp., 232 F.3d 1008, 1017 (9th Cir. 2000) cert. granted, 533 U.S. 927, 121 S.Ct. 2547, 150 L.Ed.2d 715, 69 U.S.L.W. 3789 (U.S. June 25, 2001) (No. 00-1624) (employment discrimination based on hostile working environment under Title VII, 42 U.S.C. § 2000e-5(e)). Moreover, there are policy reasons grounded in the broad remedial purpose of civil rights statutes giving rise to such claims as well as practical considerations in an ongoing relationship that warrant an approach that comports with the reality of a continuing practice of discrimination. These types of claims are not implicated here and, therefore, are not addressed by the court's opinion in this case."

790 A.2d at 550.

Michelin Tire Corp. v. Goff, 2002 WL 31103991, 19 IER Cases 232 (Ala. Civ. App. 2002)

The court held that plaintiff had adequately shown that his superior acted outside the scope of his employment and with malice. Plaintiff produced substantial evidence that his superior had repeatedly attempted to have him fired because of a discrimination grievance filed by the employee, and eventually fabricated a reason for his termination.

Riggs v. Home Builders Inst., 203 F.Supp.2d 1 (D.D.C. 2002)

The court, relying on McManus v. MCI Communications Corp., 748 A.2d 949, 952 (D.C. 2000) (citing Bible Way Church v. Beards, 680 A.2d 419, 432-33 (D.C. 1996)), held that an at-will employee could not state a claim of tortious interference with contract despite the language in several D.C. opinions recognizing that at-will employment is "a species of contract" (Sheppard v. Dickstein, Shapiro, Morin & Oshinsky, 59 F.Supp.2d 27, 32 (D.D.C. 1999) (citing Rinck v. Ass'n Reserve City Bankers, 676 A.2d 12, 15 (D.C. App. 1996)) and Sorrells v. Garfinckel's Brooks Brothers, Miller & Rhoads, Inc., 565 A.2d 285 (D.C. 1989) which involved an at-will employee suing the employer and a supervisory employee). The Riggs court held that McManus held that at-will employment, even though a species of contract, was an insufficient basis for the type of contractual relationship necessary to serve as a basis for the intentional tort of interference with contract. And, the court distinguished Sorrells, as did an earlier court in Dale v. Thomason, 962 F.Supp.181, 183 (D.D.C. 1997), on the ground that "Sorrells involved only the question whether a supervisory employee may interfere with a subordinate's

employment without a proper purpose" and "[t]he court did not consider the issue whether an at-will employee may maintain such an action at all."

West v. MCI Worldcom, Inc., 205 F.Supp.2d 531, 545-46 (E.D. Va. 2002)

In Virginia to establish a prima facie case of tortious interference with an at-will contract, the plaintiff must show "not only intentional *interference* that caused the termination of the at-will contract, but also that the defendant employed *improper* methods." Duggin v. Adams, 234 Va. 221, 227, 360 S.E.2d 832 (1987) (emphasis in original). In Virginia, improper methods are methods of interference that are "illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules." Id. In West, the claim relied on plaintiff's contention that defendant violated Title VII. As the court granted summary judgment on the Title VII claim, the tortious interference claim failed.

McGuire v. Tarmac Envt'l Co, Inc., 293 F.3d 437, 442 (8th Cir. 2002)

The court held that, under Missouri law, once a plaintiff has made a submissible case on the issue of intentional interference with a contract, plaintiff has also made a submissible case on the issue of punitive damages. See Ross v. Holton, 640 S.W.2d 166, 174 (Mo. Ct. App. 1971); Mills v. Murray, 472 S.W.2d 6, 17-18 (Mo.Ct.App. 1971).

Nickens v. Labor Agency of Metro. Washington, 600 A.2d 813 (D.C. 1991)

The court held that the tort of intentional interference with contract can proceed against a corporate officer where the officer acts with actual malice or for his own benefit, rather than for the corporation's interests. Thus, a corporate officer "will be personally liable if he acts against the corporation's interest, for his own pecuniary benefit, or with the intent to harm the plaintiff."

Stanek v. Greco, 323 F.3d 476 (6th Cir. 2003)

The Court of Appeals reversed a lower court decision, with the appellate court holding that a former employee can assert a claim for tortious interference with an at-will employment relationship against a third party under Michigan law. The court noted that the Michigan Supreme Court had not resolved whether such a claim could be asserted, but it found that in the absence of such a determination by the state's highest court, that the claim for tortious interference did not constitute an at-will exception, but rather that the tort claim existed independently of the at-will contract itself. The lower court did not address the issue as to whether the president of the plaintiff's former employer was properly a third party for the purpose of a tortious interference claim and, as such, the appellate court did not decide that issue.

Tortious Interference with Economic Relationships

Bleich v. Florence Crittenton Servs. of Baltimore Inc., 632 A.2d 463 (Md. 1993)

Maryland recognizes "two general types of tort actions for interference with business relationships[:] … inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic relationships in the absence of a breach of contract." Natural Design, Inc. v. Rouse Co., 302 Md. 47, 69, 485 A.2d 663 (1984). The two torts do have some different elements. Id. at 69. In Bleich, the Court of Special Appeals found that plaintiff's claim failed because plaintiff did not allege that a third party intentionally interfered with the business relationship and because plaintiff did not allege that the actions of a supervisor were not within the scope of her authority or "without the intent to further the interests of her [corporate] principal." See also Sullivan v. Heritage Found., 399 A.2d 856, 861 (D.C. 1979) (finding summary judgement on a claim for a tortious interference with business relationship proper because plaintiff offered no evidence that corporate officer's conduct, even if motivated by malice, was contrary to some "legitimate business purpose.").

Tortious Interference with Prospective Advantage

Riggs v. Home Builders Inst., 203 F.Supp.2d 1 (D.D.C. 2002)

The court, reciting the elements of a claim for tortious interference with prospective advantage, relying on McManus v. MCI Communications Corp., 748 A.2d 949 (D.C. 2000), and rejecting contrary federal district court decisions (Ellis v. Time, Inc., 1997 WL 863267 * 16 (D.D.C. Nov. 18, 1997); Bell v. Ivory, 966 F.Supp.2d 23, 31 (D.D.C. 1997); Rauh v. Coyne, 744 F.Supp. 1186, 1190 (D.D.C. 1990)), holds that an at-will employee may not proceed with a claim of tortious interference with business relations. The court relied on language in McManus, where the court stated that it "never has held that an employee can maintain a suit for interference with prospective advantage where her expectancy was based on an at-will relationship and we do not do so now." 748 A.2d at 957.

Civil Conspiracy

Riggs v. Home-Builders Inst., 203 F.Supp.2d 1 (D.D.C. 2002)

The court declined to dismiss a civil conspiracy claim where the plaintiff claimed that the defendants conspired together to terminate plaintiff's employment because he refused to advance defendant's NAHR's political and legislative agenda through means prohibited by federal tax laws and DOL regulations. The court held that plaintiff had satisfied the elements of a claim of civil conspiracy, i.e., "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or in a lawful act in an unlawful manner, and (3) an injury caused by an unlawful

overt act performed by one of the parties to the agreement (4) pursuant to, and in furtherance of, the common scheme." Griva v. Davison, 637 A.2d 830, 848 (D.C. 1994) (citing Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983)).

Wesley v. Howard Univ., 3 F.Supp.2d 1, 4 (D.D.C. 1998)

The court recognized an exception to the intracorporate conspiracy doctrine where the individual conspirators are not acting on behalf of the corporation and within the scope of their employment, but solely for personal, non-business motivations. See also Weaver v. Gross, 605 F.Supp. 210, 215 (D.D.C. 1985); Roniger v. McCall, 22 F.Supp.2d 156, 169 (S.D. NY 1998).

Walker v. Boeing Corp., 218 F.Supp.2d 1177, 1183 (C.D. Cal. 2002)

The court held that the statute of limitations for civil conspiracy "is determined by the nature of the action in which the conspiracy is alleged." 218 F.Supp.2d at 1183 (quoting Boys Town, USA, Inc. v. World Church, 349 F.2d 576, 579 (9th Cir. 1965) (quoting Agnew v. Parks, 343 P.2d 118, 123 (Cal. 1959).

De Boer Strucutres v. Shaffer Tent and Awning Co., 233 F.Supp.2d 934 (S.D. Ohio 2002)

The Southern District of Ohio, among other things, denied partial summary judgment to the defendant for the plaintiff employees' claim of conspiracy to breach fiduciary duty, holding that the civil conspiracy claim did not require a duty to exist on the part of a co-conspirator, but only a "common understanding or design to commit an unlawful act."

Spoilation of Evidence

Sterbenz v. Attina, 205 F.Supp.2d 65 (E.D.N.Y. 2002)

In a non-employment case, the court collects New York authorities which, with one exception, reject spoilation of evidence as a cognizable tort action. The court also collects authorities from those states that recognize the claim on the scope of the duty to preserve evidence.

Timber Tech Engineered Bldg. Prods. v. Home Ins. Co., 55 P.3d 952 (Nev. 2002)

The Supreme Court declined to recognize an independent tort for spoliation of evidence. The court collects authorities recognizing and rejecting such a claim.

Homes v. Amerex Rent-A-Car, 710 A.2d 846 (D.C. 1998)

The court recognized a claim for the tort of negligent or reckless spoliation of evidence to be used in a civil case. The elements of such a claim were set forth as follows:

> (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence by the duty-bound defendant; (4) significant impairment in the ability to prove the potential civil action; (5) a proximate relationship between the impairment of the underlying suit and the unavailability of the destroyed evidence; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages adjusted for the estimated likelihood of success in the potential civil action.

Hannah v. Heeter, 584 S.E.2d 560 (W.Va. 2003)

The Supreme Court of West Virginia answered certified questions submitted by the lower court with respect to whether West Virginia recognizes spoliation of evidence as a stand-alone tort when the spoliation results from a negligent act of a party to the action, when the spoliation results from an intentional act of a party to the action, and when the spoliation results from a negligent act of a third party. The court held that West Virginia does not recognize spoliation as a stand-alone tort when the spoliation is the result of a negligent act by a party, but that it does recognize such spoliation when it is the result of an intentional act by that same party. The court also held that spoliation as a stand-alone tort can be articulated when it result from the negligent act of a third-party.

Evidence

Stover v. Rite Aid Corporation, No. 00ca3070 (D.C.Super 2002)

The court addressed the question as to whether a defendant may include evidence of a witness' lack of prior sexual harassment charges on the basis of establishing the character of the witness, establishing credibility, proving the reasonableness of the defendant employer's actions before and after the harassment, and demonstrating the witness' lack of intent to commit the alleged act. The court held that such evidence could not be introduced on direct examination to speak to the character of a non-party witness and was irrelevant to his credibility as a witness, but was relevant to the defendant's actions and the reasonableness thereof. However, such evidence was subject to several limiting instructions making it clear that the evidence was only to be introduced as to the reasonableness of the defendant corporation's action with respect to the witness and not as evidence as to whether the witness had indeed harassed anyone. The court made a distinction between the permissible use of a prior bad act to show motive and intent, versus the absence of such an act to show the absence of such motive or intent, the latter of which was prohibited.

Mena v. Key Food Stores, 2003 N.Y.Slip.Op. 23490, 758 N.Y.S.2d 246 (N.Y. Sup. Ct. 2003)

The Supreme Court in Kings County, New York, in a racial bias suit where plaintiff employees secretly taped telephone conversations where the defendant referred to potential job applicants with racial slurs and other epithets, the court found that such evidence would not be suppressed, even if such conversations were taped with the assistance and on the advice of plaintiff's counsel and then released to the press. The court found that defendant's argument that such conduct violated the Code of Professional Responsibility was inapposite because the judiciary is not constrained to read the rules of professional conduct literally in litigation but rather to use them as guidelines in litigation and that, even if such rules are violated, suppression of evidence should not occur unless "some constitutional, statuory, or decisional authority" mandates otherwise. As such, defendant's motion to suppress evidence was denied.

State Whistleblowers Law

Ginn v. Kelley Pontiac-Mazda, Inc., 841 A.2d 785 (Me. 2004)

Maine's highest court held that the plaintiff in an employment discrimination action under state whistleblower law is not entitled to the value of his company car as part of a back pay award, absent any evidence that plaintiff incurred out-of-pocket expenses as a result of his loss of the car. The car had been provided by the employer for commuting purposes.

Branche v. Airtran Airways, Inc., 342 F.3d 1248 (11th Cir. 2003)

The court reversed summary judgment for the employer holding that the federal Airline Desegregation Act did not preempt an employee's whistleblower claim under Florida's Whistleblower Act.

Ebelt v. County of Ogemaw, 231 F.Supp.2d. 563 (E.D. Mich. 2002)

The Michigan anti-discrimination law (Elliott-Larsen Civil Rights Act) and the Michigan Whistleblower Protection Act do not apply to independent contractors.

Mehlman v. Mobil Oil Corporation, 707 A.2d 1000 (N.J. 1998)

The Supreme Court of New Jersey upheld an appellate court decision that New Jersey's Conscientious Employee Protection Act (CEPA) protected an employee from retaliation by his employer because he publicly objected to the high levels of benzene sold by one of the employer's Japanese subsidiaries. The court held that "the sensible meaning of CEPA is that the objecting employee must have an objectively reasonable belief, at the time of objection or refusal to participate in the employers offensive activity, that such activity is either illegal, fraudulent or harmful to the public health, safety or welfare, and that there is a substantial likelihood that the

questioned activity is incompatible with a constitutional, statutory, or regulatory provision, code of ethics, or other recognized source of public policy" and that a plaintiff was not required to specifically know the "precise source of public policy." The fact that the citizens affected by the public policy that the employee believed supported his claim for retaliation were not citizens of New Jersey, but in fact Japanese, did not eviscerate the plaintiff's claim. The dissent argued among other things that "Congress is free to regulate the overseas activities of domestic companies," but that it was doubtful that the New Jersey courts or legislature could do the same.

Montgomery v. E. Corr. Institut., 835 A.2d 615 (Md. 2003)

The Maryland Court of Appeals granted certiorari to an administrative assistant in the state prison system who filed a whistleblower complaint against the system, claiming that she was reassigned within the system in retaliation for a grievance filed against her former supervisor. The court specifically granted certiorari to answer the question as to whether a state employee "who has field a grievance about the behavior of her supervisor, complaining that he has created a hostile work environment that is detrimental to her career, made a 'protected disclosure' under section 5-305 of Maryland's Whistleblower Act." The parties stipulated that the Maryland Whistleblower Act was "patterned after the whistleblower provisions of the Civil Service Reform Act (CSRA)" and therefore the court applied Federal Circuit and Merit Systems Protection Board jurisprudence to show that the "an alleged reprisal by a supervisor against an employee for filing a personnel grievance about that supervisor is not protected under Maryland's Whistleblower Law."

Adams v. Uno Rests., Inc., 794 A.2d 489 (R.I. 2002)

The court affirmed a verdict for plaintiff under the state Whistleblower Protection Act where plaintiff, after notifying the Department of Health of unsanitary conditions in defendant's kitchen, was fired on a pretextual basis, a complaint was lodged by employer with police, a criminal charge of disorderly conduct was made against him, his National Guard security clearance was revoked and he lost an overseas assignment as a consequence.

Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc., 637 N.W.2d 270 (Minn. 2002)

Plaintiff questioned whether another employee was entitled to vacation pay under the wage and hour laws. Plaintiff sued under Minnesota's whistleblower statute which provides for a cause of action for an employee terminated because "(a) the employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official[.]" The lower court found that the statute contained a public policy requirement and that none was implicated in the case. The Supreme Court reversed, rejecting "the importation of a public policy requirement into the whistleblower statute …"

Lincoln v. Interior Reg'l Hous. Auth., 30 P.3d 582 (Alaska 2001)

The court reversed summary judgment on a state whistleblower act claim where plaintiff had been threatened with disciplinary action if she cooperated with a United States Department of Housing and Urban Development (HUD) investigation and thereafter plaintiff wrote to HUD expressing her fear of retaliation if she divulged information regarding defendant's practices; where after plaintiff cooperated with HUD, she was laid off in an irrational job elimination; and where her former job was redefined so that she was ineligible for it. The court found that genuine issues of material fact existed as to whether defendant's conduct was pretextual.

Branche v. Airtran Airways, Inc., 342 F.3d 1248 (11th Cir. 2003)

The Court held that plaintiff's retaliatory discharge claim in violation of Florida's Whistleblower Act was not preempted by the Airline Deregulation Act, including the amendment thereto which included whistleblower protections for airline employees.

State Anti-Discrimination Laws

Egan v. Hamline United Methodist Church, 679 N.W.2d 350 (Minn. Ct. App. 2004)

The Minnesota Court of Appeals held that a former music director of the defendant church could not sue the church under the state anti-discrimination law because his work as music director related to the religious purposes for which the church was organized.

Pardue v. Center City Consortium Schs. of the Archdiocese of Wash., Inc., 2003 WL 21753776 (D.C. Super. Ct. 2003)

Judge Boasberg held that the Free Exercise Clause exemption of the selection of clergy from Title VII extended to the principal of a Catholic School in the Archdiocese of Washington and that the District of Columbia Superior Court did not have subject matter of the claim. In applying the Rayburn test, 772 F.2d at 1168, which examines an employee's function rather than ordination in determining whether an employee should be treated as clergy for the purposes of determining subject matter jurisdiction, the court held that the function of a principal in the Catholic school system was to play "a significant religious and spiritual role in furthering" of the Church's mission.

Friedman v. Southern California Permanente Med. Group, 102 Cal.App.4th 39, 125 Cal.Rptr.2d 663, 89 FEP (BNA) 1507 (Cal. Super. Ct. 2002)

The court found that veganism is not a "religious creed" within the meaning of the California anti-discrimination law. Defendant required that plaintiff be vaccinated for mumps. Plaintiff declined because the vaccine is grown in chicken embryos and thus to be vaccinated would violate plaintiff's system of beliefs and would be considered immoral by him. When plaintiff refused to be vaccinated, defendants withdrew its job offer. But see Peterson v. Wilmur Communications, Inc., 205 F.Supp.2d 1014 (E.D. Wis. 2002) (white supremacist belief system called "Creativity" was a "religion" within the meaning of Title VII, based on employee's statements that he had a sincere belief in the teachings of Creativity, and that he considered Creativity to be his religion).

Dooley v. Autonation USA Corp., 218 F.Supp.2d 1270, 1279 (N.D. Ala. 2002)

Court held that, as Alabama Age Discrimination in Employment Act tracks the federal ADEA in its interpretation and as the Eleventh Circuit has rejected the disparate impact theory under the federal ADEA, a disparate impact claim under the Alabama statute will not lie.

Arnold v. Janssen Pharmaceutical, Inc., 215 F.Supp.2d 951, 955-56 (N.D. Ill. 2002)

The Illinois state anti-discrimination law preempts/displaces common law claims "inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the Act itself." Maksimovic v. Tsogalis, 687 N.E.2d 21, 23 (Ill.1997). The court held that "[m]ere factual overlap is not decisive." 215 F.Supp.2d at 955. The court held that ant-discrimination law was not intended to preempt all tort claims arising out of the actions it prohibits. Id.

H.P. White Laboratory, Inc. v. James L. Blackburn, 372 Md. 160, 812 A.2d 305 (Md. 2002).

The Maryland Court of Appeals held that a Harford County code providing for a cause of action for retaliation was unconstitutional, as it did not constitute a *local* law but rather encroached on the authority of the Court of Appeals or the General Assembly of the state to create either statutory or common law causes of action. The court reversed all awards stemming from claims based entirely on the county retaliation provision.

Stover v. Rite Aid Corporation, No. 00ca3070 (D.C. Super 2002)

The court affirmatively answered whether the jurisdiction should apply the affirmative defense that an employer is not vicariously liable to an employee if they do not take a "tangible employment action" against an employee, as articulated in the Supreme Court decisions in

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Rotan, 524 U.S. 775 (1998), to an action brought under the District of Columbia Human Rights Act (DCHRA). The court reasoned that the DCHRA and Title VII afforded substantially similar protections with respect to employment discrimination, and by virtue of such similarity adopted the Supreme Court reasoning in the absence of any controlling legal authority.

Knight v. Georgetown Univ., 725 A.2d 472 (D.C. 1999)

The District of Columbia Court of Appeals affirmed both a trial court judgment for the defendant hospital in a District of Columbia Human Rights Act (DCHRA) claim and for the plaintiff nurse in a promissory estoppel claim, where the African-American defendant was not placed in a supervisory position as the two white nurses were after a reorganization within the Department of Laboratory Medicine. The Court held that there was no plain error in jury instructions for racial discrimination where the jury is instructed to consider all evidence, where the trial court described claims against each defendant, and where the liabilities of the employer and aiders or abettors were delineated. The Court also held that an employer's oral promise during reorganization not to discharge an employee successfully rebutted a presumption of at-will employment. The Court of Appeals did vacate the lower court's distribution of costs, which favored the defendant, stating that the defendant could not be deemed the prevailing party just because the plaintiff lost on the DCHRA claim, since the defendant did prevail on the promissory estoppel claim. However, two other individual plaintiffs prevailed on the DCHRA claim and were not sued under the promissory estoppel claim; as such, the apportionment of court costs to them was valid.

Dahill v. Police Dep't of Boston, 748 N.E.2d 956 (Mass. 2001)

The United States District Court of Massachusetts asked whether the Massachusetts antidiscrimination statute required consideration of "mitigating or corrective devices in determining whether a person has a handicap." The Supreme Judicial Court of Massachusetts answered this question in the negative, holding that such mitigating or corrective devices did not need to be considered. The court further stated that though the fact that a police officer wore a hearing aid would not bar him from bringing a discrimination suit against the police department for firing him, he would still have to prove that he could perform his job with or without reasonable accommodation and that his handicap, in this case of loss hearing, was the reason that the police department fired him.

Briggs v. New York State Dept. of Transp., 233 F.Supp.2d 367 (N.D.N.Y. 2002)

The court held, among other things, that individual defendants may be held liable under New York's Human Rights Law (HRL) for sex discrimination, based upon the Second Circuit's decision in Tomka v. Seiler Corp., 66 F.3d 1295 (2nd Cir. 1995), where the court held that the aider and abettor provision with the HRL provides a basis for holding individuals who participate

in the conduct liable. However, the court held that where a complaint does not specifically allege that an individual participated in discriminatory conduct, that individual cannot be held liable as an individual.

Beason v. United Techs. Corp., 337 F.3d 271 (2nd Cir. 2003)

The court found that the lower court erred in relying upon the ADA's standard for determining whether a person is disabled within the meaning of the Connecticut Fair Employment Practices Act (CFEPA). The court found that the CFEPA's definition of physical disability is broader than the ADA's. Further, the court found that the CFEPA provides, unlike the ADA, no cause of action for perceived physical disability**.**

State/Local Laws Prohibiting Sexual Orientation/Gender Identification Discrimination

Philadelphia City Ordinance Bill No. 010719
(http://www.locallawpub.com/02-1update/01071900.pdf)

Florida – Section 15-21 of St. Petersburg City Code
(http://web.tampabay.rr.com/jmartin3/city_govt.htm)

Rhode Island – Sexual Harassment, Education, and Training Law
(http://www.rilin.state.ri.us/Statutes/TITLE28/28-51/INDEX.HTM)

State Laws Prohibiting Discrimination Based on Genetic Information

New Jersey Fair Employment Practices Act
(http://hr.cch.com/default.asp?subframe=/state-law-changes/january02.asp)

Virginia Genetic Testing Law
(http://www.doli.state.va.us/publications/pdf%20files/doli%20bill%20summaryrevised2.pdf)

Virginia enacted a statute prohibiting genetic testing or characteristics from being used in hiring or promotion.

State Law Prohibiting Discipline Because of Display of American Flag

New Jersey Law Prohibits Flag Discrimination
(http://www.njlawnet.com/legislation2001.html)

New Jersey enacted a statute prohibiting discrimination against employees who display the American flag at work.

State Law Prohibiting "English only" Policies

The Illinois Human Rights Act has been amended, effective January 1, 2004, to prohibit employers from adopting or enforcing a policy that limits or prohibits the use of any language in the workplace. See Public Act 93-0217, available at: http://www.legis.state.il.us/legislation/publicacts/fulltext.asp?Name=093-0217.

Volunteer Protection Act of Arizona

Armendarez v. Glendale Youth Center, Inc., 265 F.Supp.2d 1136 (D. Ariz. 2003)

The United States District Court in Arizona held that the Volunteer Protection Act (VPA) overed both state and federal claims, shielding volunteers for a nonprofit or governmental entity in any tort claim from liability stemming from acts committed within the scope of their responsibilities as a volunteer. A plaintiff employee's claim for unpaid wages under the Federal Labor Standards Act was therefore dismissed as it pertained to individual defendant members of the board of the non-profit co-defendant organization, as the Federal Labor Standards Act did not fall in the explicit exceptions to the VPA set forth by Congress.

New Jersey Conscientious Employee Protection Act

DaBronzo v. Roche Vitamins, Inc., 232 F.Supp.2d 306 (D.N.J. 2002)

The court found that New Jersey's Conscientious Employee Protection Act did not apply to independent contractors.

Covenant of Good Faith and Fair Dealing

Baradell v. Bd. of Soc. Servs., 970 F.Supp. 489, 494 (W.D. Va. 1997)

The court held that Virginia "does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing in the employment context." See also Schryer v. VBR, 1991 WL 835295, at *3 (Fairfax 1991)("I find no authority in Virginia for implying a covenant of good faith and fair dealing in an at-will employment context.")(*citing* Mason v. Richmond Motor Company, 625 F.Supp. 883, 889-90 (E.D. Va. 1986); Costantino v. Jaycor, 816 F.2d 671 (4th Cir. 1987)).

Paul v. Howard Univ., 754 A.2d 297 (D.C. 2000)

The court held that an at-will employee cannot pursue a claim for breach of the covenant of good faith and fair dealing "because there is no contract to provide a basis for the covenant." In doing so, the court emphasized that "all contracts contain an implied duty of good faith and fair dealing as enumerated in Hais v. Smith, 547 A.2d 986 (D.C. 1988). In Hais, the court stated that the covenant means that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 547 A.2d at 987. The Hais court said that if a party to the contract evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, said party may be liable for breach of the covenant .

Lewis v. Methodist Hosp., Inc., 205 F.Supp.2d 987 (N.D. Ind. 2002)

The courts have issued inconsistent decisions as to whether the covenant of good faith and fair dealing is a term of the contract to which the contractual statute of limitations applies, or a duty implied by law imposing a standard of performance, subject to the tort statute of limitations. The Lewis court found that the two-year tort statute of limitations applied. See also West Haven v. Commercial Union Ins. Co., 894 F.2d 540, 546 (2d Cir. 1990) (breach of the implied covenant of good faith and fair dealing is governed by the three year statute of limitations for torts); Kent v. AVCO Corp., 849 F.Supp. 833, 835 (D. Conn. 1994) (same); Krondes v. Norwalk Savings Society, 53 Conn.App. 102, 113 n. 9, 728 A.2d 1103 (1999) (noting that trial court applied contractual statute of limitations); Greenwoods Scholarship Found., Inc. v. Northwest Comm. Bank, 1999 WL 417939 *4 n.5 (Conn. Super. 1999) ("breach of the implied covenant of good faith and fair dealing is in essence a contract claim, and hence the six year statute applies"); Love v. Fire Ins. Exchange, 221 Cal.App.3d 1136, 1144 n.4, 271 Cal.Rptr. 246, 249 n.4 (1990) (claim for breach of the covenant of good faith and fair dealing subject to contract statute of limitations "insofar as it rests on the implied contractual promise").

Edell & Assocs., P.C. v. Law Offices of Angelos, 264 F.3d 424, 444 (4th Cir. 2001)

Plaintiff sued the Angelos firm for an alleged lack of good faith and fair dealing in performing its obligations under a contract and did not allege that the Angelos firm prevented them from performing their obligations under the contract. While Maryland recognizes the implied covenant of good faith and fair dealing in contracts (E. Shore Mkts., Inc. v. J.D. Assocs., Ltd. P'ship, 213 F.3d 175, 182-83 (4th Cir. 2000)), the covenant is limited to prohibiting one party from acting in such a manner as to prevent the other party from performing his obligations under the contract, and does not extend to imply a general duty of good faith and fair dealing in the performance of obligations under the contract that do not implicate or impair another party's performance under the contract.

Froelich v. Erickson, 96 F.Supp.2d 507 (D. Md. 2000)

The court recognized, without deciding the question, that the Maryland Court of Appeals has never explicitly stated that there is a cause of action for breach of the duty of good faith and fair dealing that is separate from a breach of the underlying contract and that the federal district court for Maryland has consistently held that there is not a separate cause of action under Maryland law. See Baker v. Sun Co., 985 F.Supp. 609 (D. Md. 1997); Howard Oaks, Inc. v. Maryland Nat'l Bank, 810 F.Supp. 674 (D. Md. 1993). Maryland holds that the covenant does not add obligations to a contract, but rather prohibits one party from acting in such a manner as to prevent the other party from performing his obligations under the contract.

Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089 (Cal. 2000).

Supreme Court held that the covenant of good faith and fair dealing could not be used to impose substantive limits on an employer's authority to terminate an at-will employee.

Huegerich v. IBP, Inc.,547 N.W.2d 216 (Iowa 1996)

The Supreme Court rejected a breach of an implied covenant of good faith and fair dealing exception to the employment at-will doctrine. See Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 456-57 (Iowa 1989) (collecting cases from other jurisdictions rejecting application of the covenant in the at-will context).

Cochran v. Quest Software Inc., 328 F.3d 1 (1st Cir. 2003)

Among other claims, plaintiff contended that his termination prevented the vesting of his remaining stock options and thus constituted a breach of the covenant of good faith and fair dealing. The court rejected the argument on the ground that the unvested stock options could not be treated as deferred compensation for services already performed, relying upon Harrison v. NetCentric Corp., 744 N.E.2d 622, 629-30 (Mass. 2001).

Non-Compete Agreements

Lake Land Employment Group of Akron v. Columber, 804 N.E.2d 27 (Ohio 2004)

The Ohio Supreme Court held that a non-compete covenant executed by an at-will employee at some point in time after he began working for the employer is nonetheless enforceable and does not require any additional consideration.

Corporate Express Office Prods., Inc. v. Phillips, 847 So.2d 406 (Fla. 2003)

The Florida Supreme Court held that a successor employer could enforce non-compete covenants that former employees had entered into with their original employers and that no assignment was necessary. The successor employer acquired one company through a merger and the other through a one hundred percent stock purchase agreement. An asset purchase would be treated differently under Florida law. The court stated that "[w]here the corporations have truly merged, a corporate tortfeasor by any other name is still a tortfeasor, to paraphrase Shakespeare."

Olander v. Compass Bank, 2004 U.S. App. LEXIS 6486 (5th Cir. 2004)

The Fifth Circuit affirmed in part and reversed in part the ruling of the Southern District of Texas which had been sitting in diversity and applying Texas law to a provision in a stock option plan that made enforceability of a non-compete agreement into a requirement for the stock option plan to remain effective. The court of appeals found that the district court did not err in holding that the non-compete agreement was unenforceable, because a non-compete "cannot, on its own, form the consideration for an agreement" and it "must be ancillary" to a contract. The lower court did err, however, in holding that the unenforceable non-compete agreement which purported to "supersede" a prior agreement invalidated the same. Because the later agreement was unenforceable, the prior agreement was restored and the court was reversed on these grounds.

Application Group, Inc. v. Hunter Group, Inc., 72 Cal.Rptr.2d 73 (Cal.App.1st 1998)

The Court of Appeal of California affirmed a lower court decision that California and not Maryland law applied to the validity of a covenant not to compete placed in employment contracts of the out-of-state defendant corporation's consultants, who also did not reside in California, where a California employer sought to recruit and hire these same consultants. The court held that the covenants could not be enforced against the plaintiff corporation that had hired the defendant's former consultant, who had been a resident of Maryland but was hired to work in California. Despite the fact that a Maryland choice-of-law clause was in the contract between the defendant and the consultant, the court held that California law applied, because the covenant would restrict competition in California, thereby invoking the state's interest I protecting its own employers and business opportunities therewith. California jurisprudence has shown that the policy against non-compete covenants in employment contracts is a "fundamental policy" of the state. Further, California's interests would be seriously impaired if Maryland law were to trump in this matter, whereas the defendant could not show evidence that the consultant in this case was performing "unique services" or would be able to "misuse trade secrets, routes, or lists of clients," the existence of which would show that Maryland's interest would be seriously impaired.

Modern Environments, Inc., v. Stinnett, 561 S.E.2d 694 (Va. 2002)

The plaintiff was party to a non-competition agreement with his former employer that prohibited him from working with any of his former employer's competitors in any capacity. Plaintiff filed a declaratory judgment action to establish that the non-compete agreement was overbroad and unenforceable. Defendants failed to present any evidence of any legitimate business interest that is served by prohibiting the employee from being employed in any capacity by a competing employer. Based on that record, the court affirmed the trial court's decision that the non-compete agreement was unenforceable.

Newport News Indust. v. Dynamic Testing, Inc., 130 F.Supp.2d 745 (E.D.Va. 2001)

Court found that new employer could be vicariously liable under Virginia Uniform Trade Secrets Act ("VUTSA") for misappropriation of trade secrets by its employee, acting within the scope of his employment. Even though the Act is silent whether respondeat superior applies, the court found the VUTSA does not preempt, or specifically or impliedly reject the doctrine. Thus, the court found "it is perfectly consistent to hold the employer liable for infringing acts of its employees committed within the scope of employee's scope of employment." Id. at 754.

Cohoon v. Fin. Plans & Strategies, Inc., 760 N.E.2d 190 (Ind. Ct. App. 2001)

Court of Appeals enforced non-compete that restricted financial planner from soliciting the business of the employer's clients with whom it did business during the 12 months preceding plaintiff's termination. Indiana courts disfavor non-competition clauses that seek to protect the employer's interest in past clients. The court found that clients who did business with the company during the former employee's tenure with the company constitute present, not past, clients. Accordingly, the agreement sought to protect a legitimate, protectable interest. The court went on to find the geographical restrictions to be a non-issue as, even if unreasonable, the covenant was still enforceable using the class of persons with whom plaintiff could have no contact. The court also found that plaintiff had breached the agreement before the employer's alleged material breach (i.e., failure to timely pay plaintiff for accrued and unused vacation days), and thus the company's alleged material breach did not bar enforcement.

Clark Substations, LLC v. Ware, 838 So.2d 360 (Ala. 2002)

Supreme Court, relying heavily on Alabama statutory law, found that a non-competition agreement with the plaintiff-employer's predecessor was not enforceable. See also Reynolds v. Reynolds Co. v. Hardee, 932 F.Supp.149 (E.D. Va. 1996) (non-competition covenant was a part of a contract for personal services and not assignable under Virginia law), aff'd, 133 F.3d 916 (4th Cir. 1997); Hart Conover, Inc. v. Hart, 147 Va. Cir. 135, 1998 WL 888940 (Va. Cir. Ct. Sept. 10, 1998); Christian Defense Fund v. Stephen Winchell & Assocs., Inc., 47 Va. Cir. 148, 1998 WL 972334 (Va.Cir.Ct., Sept. 14, 1998) and 1999 WL 51867 (Va.Cir.Ct. Jan. 11, 1999).

SIFCO Indus. Inc. v. Advanced Plating Tech., Inc., 867 F.Supp. 155, 155-59 (S.D.N.Y. 1994)

Court held that covenants not to compete were unenforceable where, upon acquiring the company with whom the employees had entered into covenants, successor company terminated employees' positions by closing factory at which employees worked.

Novacare Orthotics & Prosthetics E., Inc. v. Speelman, 528 S.E.2d 918 (N.C. App. 2000)

Court held that customer lists were not "trade secrets" where information would have been easily accessible through a local telephone book.

Wade S. Dunbar Ins. Agency, Inc. v. Barber, 556 S.E.2d 331 (N.C. App. 2001)

The court held that a non-competition covenant in the original verbal employment contract is supported by adequate consideration and the fact that the written contract was executed after the employee started work is insignificant. In the instant case, the contract stated that the employee acknowledges and agrees that the terms of the non-compete provision were fully discussed and agreed upon prior to the date of execution and prior to the employee's commencement of work.

Mona Elec. Group, Inc. v. Truland Serv. Corp., 193 F.Supp.2d 874 (E.D. Va. 2002)

Former employer sued a former employee's new employer to enforce an agreement signed by former employee not to solicit plaintiff's customers for a year following his departure from the company. Employee had worked for former employer, off and on, for some 30 years. During the last of those years of employment, employee signed the non-solicitation agreement. Prior to that time he had not been party to such an agreement. New employer, sued for tortious interference with contract, argued that an element of such a claim was absent as the contract was not valid because the continued employment is not adequate consideration. The court collected authorities supporting and rejecting the argument. The Fourth Circuit and the Virginia Supreme Court have not addressed the issue. The court rejected the holding from Maryland (Simko v. Graymar, 464 A.2d 1104, 1107 (Md. 1983)) which held that continued employment constitutes adequate consideration for a restrictive covenant and instead adopted the holding of the West Virginia Supreme Court (PEMCO Corp. v. Rose, 257 S.E.2d 885, 889 (W.Va. 1979)) which predicated that Virginia would follow the holding in Kistler v. O'Brien, 347 A.2d 311 (Pa. 1975) holding that continued employment, in and of itself, did not constitute consideration for the non-competition covenant. The court emphasized that in the case before the court, unlike Simko, the employer did not threaten the employee with termination if he failed to sign the restrictive covenant.

First Allmerica Fin. Life Ins. Co. v. Sumner, 212 F.Supp.2d 1235 (D. Or. 2002)

Oregon by statute makes non-competition agreements between an employer and an employee void unless the agreement is entered into upon the initial employment of the employee or the subsequent advancement of the employee. In First Allmercia, the court had to decide whether a prohibition on inducing insurance policy holders to terminate or replace policies falls within the definition of a non-competition agreement, and whether providing a severance package and a favorable compensation formula as consideration for the non-compete constitutes "bona fide advancement." The court held that the non-solicitation constituted a non-competition agreement and the severance not to be "bona fide advancement." Thus, as the agreement was not executed at the inception of employment, it was not enforceable.

Keener v. Convergys Corp., 205 F.Supp.2d 1374 (S.D. Ga. 2002)

Judge Edenfield, in concluding an opinion holding a non-compete covenant to be unenforceable under Georgia law, stated:

> "Although the result reached here is required by Georgia law, it nevertheless presents an unfortunate clash between the core values enshrined in fundamental contract law versus judicial and legislative choices governing the free flow of commerce. Restrictive covenants have been around for ages. They offer intellectual property owners protection against theft and dilution by others. They encourage investment and expand business opportunities. Society is served by the expansion of commerce and the prosperity it brings.
>
> As noted, Keener admits he became privy to confidential information. But a fair reading of recent Georgia appellate decisions leads to the conclusion that employers within and without this State are, in many respects, powerless to protect business secrets. Judges are not endowed with business acumen, and a lot of the line drawing required in this field necessitates same. Whether and when a better line should be drawn in cases like this is perhaps best left to legislators, not judges."

205 F.Supp.2d at 1383 (footnote omitted).

Advance Tech. Consultants, Inc. v. RoadTrac, LLC, 551 S.E.2d 735 (Ga. 2001)

The court held that Georgia does not employ the "blue pencil" doctrine of severability in restrictive covenant cases. Thus, an overbroad non-compete or non-solicitation covenant in a contract being strictly scrutinized automatically renders unenforceable other non-solicitation or non-compete convenants in the same agreement. See also Keener v. Convergys Corp., 205 F.Supp.2d 1374 (S.D. Ga. 2002); Morgan Stanley DW, Inc. v. Frisby, 163 F.Supp.2d 1371, 1377-78 (N.D. Ga. 2001).

Francorp, Inc. v. Siebert, 126 F.Supp.2d 543 (N.D. Ill. 2000)

Where the plaintiff-employer failed to pay employees in a timely fashion, said failure constitute a material breach of the employment relationship and accordingly the employer could not enforce the restrictive covenants against the former employees. The court based its holding on the general principle that a material breach of contract by one party excuses non-performance on the part of the non-breaching party.

Moore v. Kulicke & Soffa Industries, Inc., 318 F.3d 561 (3rd Cir. 2003)

The Court of Appeals affirmed a lower court judgment, holding that independent development by a defendant was not of itself an affirmative defense against a trade secret claim, but that it did shift the burden to the plaintiff to prove that there was no independent development. One judge concurred in the judgment only, holding that independent development and use of a trade secret were "mutually exclusive," but that the trade secret claim had already failed on other grounds.

Rencor Controls, Inc. v. Stinton, 230 F.Supp.2d 99 (D. Me. 2002)

The court denied a motion for a company's preliminary injunction against a former sales representative from joining a competitor company, holding that the former representative's knowledge of the company's pricing structure would not lead to irreparable injury when the former representative returned all pricing software to his former employer.

Inevitable Disclosure Doctrine in Non-Compete Litigation

CMI Int'l, Inc. v. Intermet Int'l Corp., 649 N.W.2d 808 (Mich. Ct. App. 2002)

Auto parts manufacturer sued competitor and former chief technical officer for, inter alia, threatened misappropriation of trade secrets, relying on the inevitable disclosure concept. The court held that, assuming the concept was encompassed within the notion of "threatened misappropriation," the party must establish more than the existence of generalized trade secrets

and a competitor's employment of the party's former employee who has knowledge of the trade secrets. Otherwise, the concept would compromise the right of employees to change jobs.

Northwest BEC-Corp v. Home Living Serv., 41 P.3d 263 (Idaho 2002)

Former employer sued former employee and her new employer for misappropriation of trade secrets. Defendants established that plaintiff's loss of 90 customers following former employee's departure was not a result of a misappropriation. In strong language, the court stated that the legislature did not intend that the mere hiring of a competitor's employee constitutes the acquisition of a trade secret. Further, the court said:

> "An employee will naturally take with her to a new company the skills, training, and knowledge she has acquired from her time with her previous employer. This basic transfer of information cannot be stopped, unless an employee is not allowed to pursue her livelihood by changing employers. As Judge Shadur stated, '[a]ny other rule would force a departing employee to perform a prefrontal lobotomy on himself or herself." Fleming Sales Co., Inc. v. Bailey, 611 F.Supp. 507, 514 (D.C.Ill. 1985)."

Aware, Inc., v. Ramirez-Mireles, 2001 WL 755822, 13 Mass.L.Rptr. 257 (Mass. Super. 2001)

Applying California law, the court stated:

> "What is clear, however, is that in a conflict between the policy favoring employee mobility free of encumbering restriction and the policy favoring protection of trade secrets, employee mobility prevails in California. The theory of 'inevitable disclosure' of trade secrets is not the law of California. See Bayer Corporation v. Roche Molecular System, Inc., 72 F.Supp.2d 1111, 1112 (N.D.Cal. 1999)."

City Slickers, Inc. v. Douglas, 40 S.W.3d 805 (Ark. Ct. App. 2001)

The dissent, faulting the majority for failing to address the inevitable disclosure theory, stated:

> "The majority failed to address this issue, but the inevitable disclosure inquiry is a factual inquiry that may include consideration of the similarity of the employee's new job to the position he held with his former employer and consideration of whether or not he exhibited a lack of compunction about using his former employer's proprietary information to gain an unfair tactical advantage. See Bendinger, 338 Ark. At 421-23, 994 S.W.2d at 474-75; Cardinal Freight, 336 Ark. At 152-53, 987 S.W.2d at 646-47. The inevitable disclosure principle seems squarely applicable here, as it is difficult to conceive of how appellee, with no prior experience in the automotive oil changing industry, could *operate an on-site oil changing facility after a mere six weeks of training*

without misappropriating the information provided by City Slickers." (emphasis in original).

Id. at 814.

Schlage Lock Co. v. Whyte, 125 Cal.Rptr.2d 277, 101 Cal.App.4th 1443, 19 IER Cases (BNA) 289 (Cal. Ct. App. 2002)

The court, collecting cases pro and con, emphatically stated that its "rejection of the inevitable disclosure doctrine is complete." The court found that

> "[t]he chief ill in the covenant not to compete imposed by the inevitable disclosure doctrine is its after-the-fact nature: The covenant is imposed *after* the employment contract is made and therefore alters the employment relationship without the employee's consent. When, as here, a confidentiality agreement is in place, the inevitable disclosure doctrine 'in effect convert[s] the confidentiality agreement into such a covenant [not to compete]." (PCS, Inc. v. Reiss, supra, 111 F.Supp.2d at p. 257.) Or, as another federal court put it, '[a] court should not allow a plaintiff to use inevitable disclosure as an after-the-fact noncompete agreement to enjoin an employee from working for the employer of his or her choice.' Del Monte Fresh Produce Co. v. Dole Food Co., Inc., supra 148 F.Supp.2d at p 1337; see also Matheson, *Employee Beware: The Irreparable Damage of the Inevitable Disclosure Doctrine* (1998) 10 Loyola Consumer L. Rev. 145, 162.

Government Tech. Servs., Inc. v. Intellisys Technology Corp., 1999 WL 1499548, 51 Va. Cir. 55 (Va. Cir. Ct., Oct. 20, 1999)

The Fairfax County Circuit Court held that Virginia does not recognize the inevitable disclosure doctrine.

Trespass to Chattels

Intel Corp. v. Hamidi, 114 Cal.Rptr.2d 244, 8 IER Cases (BNA) 225 (Cal. App. 2002), *reversed*, 43 P.3d 587 (Cal. 2003)

The Court of Appeals held that Intel was entitled to an injunction based on a theory of trespass to chattels against a former employee who flooded the employer's email system. See America Online, Inc. v. IMS, 24 F.Supp.2d 548, 550-51 (E.D.Va. 1998) (spam emails enjoined on trespass to chattels theory); America Online, Inc. v. LCGM, Inc., 46 F.Supp.2d 444, 449 (E.D.Va.1998) (same). The dissent stated that Intel seeks to modify the common law "in a way that alters the doctrine's very character in order to extend it where the Legislature has not yet gone." The Supreme Court of California reversed the appellate decision, holding among other things that trespass to chattels "did not encompass electronic communications that neither damaged the receipient computer system nor impaired its functioning," and that using a portion

of the employer's computer space was not an injury to the employer's interest in its own computers, which would be required to maintain a trespass to chattels claim.

Breach of Fiduciary Duty/ Duty of Loyalty

Feddeman & Co., C.P.A., P.C. v. Langan & Assocs., P.C., 530 S.E.2d 668 (Va. 2000)

The court affirmed a $3.3 million verdict against a group of employees for breach of fiduciary duty who left their accounting firm to work for a competitor, luring away clients.

Dalton v. Camp, 353 N.C. 647, 652, 548 S.E.2d 704, 708 (N.C. 2001)

The Supreme Court held that an at-will employee, a company production manager, was not in a position to exercise dominion over the employer, and thus no claim for breach of fiduciary duty lies as North Carolina has specifically limited the claim in the employment context. The court held that, outside the purview of a fiduciary relationship, North Carolina does not recognize an independent tort for breach of duty of loyalty by an at-will employee.

Government Tech. Servs. Inc v. Intellisys Technology Corp., 1999 WL 1499548 (Va. Cir. Ct., Oct. 20, 1999)

The court held that "[s]olicitation by an employee of other employees all employed 'at will' to leave their employer and join a competitor constitutes a violation of fiduciary duty and is actionable."

Froelich v. Erickson, 96 F.Supp.2d 507 (D. Md. 2000)

The court recognized, without deciding the question, that there is a split of authority whether Maryland recognizes as an independent tort a cause of action for breach of fiduciary duty. 96 F.Supp.2d at 526 n.22 (collects cases).

Weltzin v. Nail, 618 N.W.2d 293 (Iowa 2000)

The court held: "A breach of fiduciary duty claim is not an individual tort in its own right at common law." 618 N.W.2d at 299.

Exclusivity of Workers Compensation

Pickett v. Colonel of Spearfish, 209 F.Supp.2d 999 (D.S.D. 2001)

Relying on Benson v. Gable, 593 N.W.2d 402 (S.D. 1999) and the fact that South Dakota has recognized two categories of compensable emotional injuries under its workers' compensation law (i.e., mental-physical and physical – mental, but not mental-mental), the court held that plaintiff's claims of negligent retention, negligent supervision, battery, and intentional infliction of emotional distress were barred as the plaintiff alleged she was repeatedly sexually assaulted and eventually raped, a physical-mental injury.

Diaz v. Comerica Bank, 2002 WL 181778 (Mich. Ct. App. 2002)

The Court of Appeals found that plaintiff had not sufficiently alleged an intentional tort to avoid the exclusive remedy provision of the Michigan Workers Compensation Act. Plaintiff sued on behalf of a bank employee who was shot to death by a gunman at the branch at which the deceased was employed. Relying upon the definition of an intentional tort set forth in Palazzola v. Karmazin Prods. Corp., 565 N.W.2d 868 (Mich. 1997), decedent's representative had failed to satisfy that test as there was not a sufficient showing that bank managerial employees were aware of the gunman's violent tendencies and did not have actual knowledge of the extent of the threat posed by the gunman.

Archer v. Farmer Bros. Co., 70 P.3d 495, 18 IER Cases (BNA) 1059 (Colo. App. 2002)

Plaintiff, an employee of defendant for 22 years, while under investigation for alleged misconduct, had delivered to him a termination notice while he lay in bed recuperating from a heart condition. Plaintiff sued, inter alia, on a claim of intentional infliction of emotional distress, and the jury returned a verdict in plaintiff's favor. The defense, before the Court of Appeals, contended that the IIED claim should have been precluded by the state workers compensation act which barred claims that arose when "the employee is performing service arising out of and in the course of the employee's employment." The court agreed that the delivery of the termination notice arose out of the plaintiff's employment, but found that the injury did not occur "in the course of" his employment. As the plaintiff was on indefinite sick leave as a result of his heart condition when he was discharged , plaintiff was not engaged in work-related activity, and the incident did not occur within the time or space parameters of his employment; rather he was resting in bed, an activity unrelated to his employment.

Perodeau v. Hartford, 792 A.2d 752 (Conn. 2002)

The Supreme Court addressed the question whether a claim of negligent infliction of emotional distress, which is not compensable under the Connecticut worker's compensation law, is nonetheless barred by the exclusivity provisions of that law. The court held that when an

injury is expressly excluded from coverage under the law, the employee's right to pursue a common law remedy for the injury is not compromised. Nonetheless, the court went on to hold that one may not be found liable for negligent infliction of emotional distress arising out of conduct occurring within a continuing employment context, as distinguished from conduct occurring in the termination of employment as "the societal costs of allowing claims for negligent infliction of emotional distress in the context of ongoing employment are unacceptably high."

Karch v. Baybank FSB, 794 A.2d 763 (N.H. 2002)

Plaintiff sued defendant as a result of interception of telephone conversations between plaintiff and a co-worker. Plaintiff sued, inter alia, for negligent infliction and intentional infliction of emotional distress. The court found that, as a general rule, a negligence claim for personal injuries arising out of or in the course of employment is barred by the workers compensation act's exclusivity provision. In addition, the court found under the then applicable law the type of injury that was the basis for the IIED claim was compensable under the workers compensation act and thus also barred by the exclusivity provision. The court recognized that, under a recent amendment to that act, the claim might not be compensable and therefore the result might be different in such a case in the future.

Livitsanos v. Superior Court, 828 P.2d 1195 (Cal. 1992)

The Supreme Court held that if the injury arises out of employment and if the employer maintains workers' compensation insurance, then "claims for intentional or negligent infliction of emotional distress are preempted by the exclusivity provisions of the workers' compensation law." 828 P.2d at 808, 810 (Cal. 1992). See also Walker v. Boeing Corp., 218 F.Supp.2d 1177, 1189 (C.D. Cal. 2002).

Worthington v. City of New Haven, 1999 WL 958627 at *8 (D. Conn. 1999)

The court declined to apply the "comp bar" to a claim under the state anti-discrimination statute. See also Davis v. Dillmeier Enterprises, Inc., 330 Ark. 545, 957 S.W.2d 155 (1997); Moorpark v. Superior Court, 18 Cal.4th 1143, 77 Cal.Rptr.2d 445, 959 P.2d 752 (Cal. 1998); Konstantopoulous v. Westvaco Corp., 690 A.2d 936 (Del. 1996); Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099 (Fla. 1989); Hardaway Mgmt. Co. v. Southerland, 977 S.W.2d 910, 917 (Ky. 1998); King v. Bangor Federal Credit Union, 568 a.2d 507, 508-509 (Me. 1989); Goodman v. Boeing Co., 899 P.2d 1265 (Wash. 1995); Byers v. Labor & Industry Review Comm., 208 Wis.2d 388, 561 N.W.2d 678 (Wis. 1997). Some courts have held that settlement of a workers' compensation claim bars a state law disability discrimination claim. See, e.g., Karst v. F.C. Hayer Co., Inc., 447 N.W.2d 180, 184-186 (Minn. 1989).

Newman v. Giant Food, Inc., 187 F.Supp.2d 524 (D. Md. 2002)

The court held that claim for negligent hiring and retention were precluded as workers' compensation was the exclusive remedy unless the employer deliberately intended to injure or kill the employee. 187 F.Supp.2d at 529. See also, Demby v. Preston Trucking Co., 961 F.Supp. 873, 881 (D. Md. 1997); Tynes v. Shoney's Inc., 867 F.Supp. 330, 332 (D. Md. 1994)

Statute of Frauds

Schara v. Commercial Envelope Mfg. Co., Inc., 321 F.3d 240 (1st Cir. 2003)

Where a former employee sued for three years of bonus payments in the absence of a written agreement with the employer regarding such payments, the Statute of Frauds nevertheless did not apply, according to the First Circuit, under New York state law. While "New York law does not allow termination provisions solely within the control of the plaintiff to remove an agreement from the scope of the one-year provision" of the Statute of Frauds, state jurisprudence has long held that when "the right to terminate [a contract] within a year is in the hands of the defendant," the agreement is outside the Statute.

Conner v. Lavaca Hosp. District, 267 F.3d 426 (5th Cir. 2001)

The court found that a motion of the defendant's board of directors contained a three-year term of employment, thus placing it squarely within Texas' statute of frauds which states that a promise that is not performable within a year of its inception must satisfy the statute of frauds. To satisfy the statute of frauds and thus be enforceable, the oral agreement must be evidenced by "a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony." Id. at 432. The court found that two essential elements were not set forth in the board's motion, i.e., the attribution of revenues and the doctor's schedule. The plaintiff then argued that part performance took the contract out of the statute of frauds. But, as the defendant had repudiated the board's motion within days thereafter, plaintiff could not have relied on the earlier, non-repudiated, promise and reliance is a requisite element for the equitable doctrine of part performance.

Hodge v. Evans Financial Corp., 823 F.2d 559 (D.C. Cir. 1987)

A defendant corporation hired the plaintiff to serve as general counsel under an oral agreement, where the plaintiff claims that the defendant and he agreed to permanent employment. The defendant terminated the plaintiff after about nine months of service. The plaintiff sued for breach of employment contract and won a jury award. The defendant, *inter alia*, had moved for a jury instruction on the ground that an oral employment contract is unenforceable under the Statute of Frauds. The court denied this motion and the defendant appealed. The United States Court of Appeals for the District of Columbia Circuit, in an opinion

by Judge Wald, held that though the one-year provision of the statute is to be construed narrowly, the contract was not barred because the contract was capable of being performed in one year, were the employee to die within that time period. Judge MacKinnon dissented from the majority, stating that "simply because a contract may be discharged within one year does not take the contract outside the statute." Judge MacKinnon made a distinction between *performance* and *excuse*, stating that the plaintiff's death within a year would constitute an excuse for not performing the contract rather than a performance of the permanent employment contract within one year.

Arbitration

Heye v. American Golf Corp., Inc., 80 P.3d 495 (N.M. Ct. App. 2003)

The New Mexico Court of Appeals declined to enforce an arbitration provision that allowed the employer to opt out of arbitration at any time. The employer's handbook contained an arbitration provision providing that the employee agreed to resolve any disputes arising out of her employment in arbitration and that the employer reserved the right to amend, supplement, rescind or revise any policy, practice or benefit described in the handbook as it deemed appropriate.

Hubner v. Cutthroat Communications, Inc., 80 P.3d 1256 (Mont. 2003)

The Montana Supreme Court declined to require arbitration of a wrongful discharge claim where the plaintiff had signed an employee handbook containing a binding arbitration clause at the time she was hired. The court declined to enforce the arbitration clause because the handbook was ambiguous. The handbook contained a statement in a number of locations that it was not a contract, including such a contractual disclaimer in the acknowledgement form. On the other hand, the handbook immediately before the arbitration provision referred to the handbook as "this contract".

DeArmond v. Halliburton Energy Services, Inc., 81 P.3d 573 (N.M. Ct. App. 2003)

The New Mexico Court of Appeals held that an employee was not bound by the employer's new arbitration policy absent a showing that he received and read the policy materials that were mailed to his home. The court held that the employer must show that the employee actually knew of the employer's offer to arbitrate and its intention that his continued employment would constitute acceptance of this offer. The court said: "we believe the principle of conscious assent is particularly crucial in the at-will employment context, where acceptance may be manifested by continuing in a routine activity." The court went on to say that acceptance of the agreement must be "clear, positive and unambiguous".

Cheek v. United Healthcare of the Mid- Atlantic, Inc., 378 Md. 139 (Md. 2003)

The Maryland Court of Appeals, in reversing the lower court, answered in the negative the question as to "whether a valid and enforceable arbitration agreement exists between an employer and an employee when the employer has reserved the right to, within its sole discretion, alter, amend, modify, or revoke the arbitration agreement at any time and without notice, even thought it has not exercised that option…." Such an agreement was found to be unenforceable for lack of consideration as the employer's promise to arbitrate was illusory. Judge Harrell in dissent argued *inter alia* that the entire employment contract was supported by consideration and that there was no indication that the arbitration agreement was severable from the contract as a whole. The Court of Appeals therefore should have, according to Judge Harrell, enforced the arbitration agreement, as it is preferable to construe a contract in favor of its enforcement.

Barnica v. Kenai Peninsula Borough Sch. District, 46 P.3d 974 (Alaska 2002)

An evenly divided (2-2) Supreme Court affirmed the lower court's holding that plaintiff was required to pursue his state statutory discrimination claim through binding arbitration under the applicable collective bargaining agreement. The plurality and the dissent dueled over the United States Supreme Court's decisions in Wright v. Universal Maritime Serv. Co., 525 U.S. 70 (1998), and Alexander v. Gardner – Denver Co., 415 U.S. 36 (1974).

In re Halliburton Co., 80 S.W.3d 566 (Tex. 2002)

Supreme Court held that plaintiff's claim of race and age discrimination under the state anti-discrimination law must be submitted to arbitration. The court found that the employee's continuing to work for employer after it announced the adoption of its Dispute Resolution Program constituted an acceptance. The court found the disparity in bargaining power did not render the arbitration provision unconscionable. The court, rejecting earlier state precedent, found that the courts may consider both procedural and substantive unconscionability of an arbitration clause in evaluating the validity of same.

Terrell v. Amsouth Investment Servs., Inc., 209 F.Supp. 2d 1286 (M.D.Fla. 2002)

Plaintiff sued under the state whistleblower act. After removal to federal court, defendant moved to compel NASD arbitration. The court found that the NASD Code of Arbitration Procedure limited or precluded the statutory remedies otherwise available to the plaintiff under the state whistleblower act, in accordance with Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998), which requires for an arbitration agreement to be enforceable that it permit the arbitrator to provide relief equivalent to the remedies available in court, and thus motion to compel arbitration was denied.

Damages – Tax Consequences

Blaney v. Inter. Ass'n of Machinist & Aerospace, 55 P.3d 1208 (Wash. Ct. App. 2002)

The court in an action under the state anti-discrimination law found that the tax consequences to the plaintiff flowing from the lump sum payment of damages and attorney's fees was within the scope of the statutory term "actual damages". A certified public accountant had provided expert testimony, establishing that plaintiff would incur nearly a quarter of a million dollars in tax obligations that she would not have incurred but for the awards. See also Gelof v. Papineau, 829 F.2d 452 (3rd Cir. 1987) (allowing damages to compensate plaintiff for increased tax burden caused because of a single lump sum award); Sears v. Acheson, Topeka & Kansas City Ry. Co., 749 F.2d 1451, 1456 (10th Cir. 1984) (allowing an increase in award for back pay in order to compensate for the resultant tax burden from receiving a lump sum of more than 17 years in back pay); Cooper v. Paychex, Inc., 960 F.Supp. 966, 975 (E.D. Va. 1997) (citing Gelof and Sears with approval); EEOC v. Joe's Stone Crab, Inc., 15 F. Supp. 2d 1364 (S.D. Fla. 1998) (citing Sears with approval but holding that such a tax bump required a sufficient evidentiary foundation); May v. Automated Data Management, Inc., 1989 WL 38955 (D.D.C. 1989) (holding that Sears applied to protracted litigation and that sufficient evidence was required to establish the tax penalty); Blaney v. Int'l Ass'n of Machinists, 55 P.3d 1208 (Wash. 2002), rev. granted 69 P.3d 875 (Wash. 2003) (holding that tax damages were compensable under the Washington Law Against Discrimination); Jordan v. CCH, Inc., 230 F. Supp. 603 (E.D. Pa. 2002); O'Neill v. Sears Roebuck & Co., 108 F. Supp. 2d 443 (E.D. Pa. 2000); Starceski v. Westinghouse Electric Corp., 54 F.3d 1089 (3rd Cir. 1995); Laura Sager & Stephen Cohen, How The Income Tax Undermines Civil Rights Law, 73 So. Cal. L. Rev. 1075 (2000).

Breach of Contract – Mental Anguish

Howard Univ. v. Baten, 632 A.2d 389 (D.C. 1993)

The court held there could be no recovery for medical expenses related to mental anguish in a breach of employment contract action.

Breach of Contract – Attorney's Fees

Montgomery County v. Gregory Jamsa, 836 A.2d 745 (Md. App. 2003)

The Maryland Court of Special Appeals affirmed the trial court's reversal of the Merit System Protection Board's original determination that it did not have the legislative authority to award attorney's fees connected to services rendered in the course of judicial review to employees. The appellate court held that a county ordinance which requires the county to pay attorney's fees resulting from judicial review initiated by the county after a favorable decision for an employee

is not a limitation on the Board's authority to award attorney fees, but rather a mandate that the county pay for fees incurred by an employee when appealing a board decision.

McIntosh v. Aetna Life Ins. Co., 268 A.2d 518 (D.C. 1970)

The court held that "absent a contract or statutory provision or a showing that the defendant's conduct was willfully and aggressively fraudulent, attorney's fees are not generally allowed as damages or costs."

Friolo v. Frankel, 373 Md. 501, 819 A.2d 354 (Md. 2003)

The Maryland Court of Appeals, in an opinion that chronicles federal and state jurisprudence with respect to the development of the "lodestar" approach to fee calculation, by which the court multiplies the reasonable number of hours expended by an attorney in litigation by a reasonable rate and then adjust an attorney fee award to that particular calculation, held that such an approach is appropriate for calculating fee awards in actions brought under Maryland Code §§ 3-427 and 3.507.1 of the Labor and Employment Article. The court qualified its own holding, however, by stating that such calculation must also include "careful consideration of appropriate adjustments" to their calculation "which, in almost all instances, will be case-specific." The court specifically found that the trial judge's award of attorney's fees to appellant, equivalent to 40% of her total recovery was an abuse of discretion, because the judge did not adequately indicate whether the lodestar approach had been used in determining that figure. The court further indicated that because the Maryland statutes allow specifically for reasonable 'counsel fees,' charges for paralegals and legal interns must be subsumed within the calculation of attorney's fees.

Breach of Contract – Consequential Damages

O'Toole v. Northrop Grumman Corp., 305 F.3d 1222 (10th Cir. 2002)

Plaintiff sought certain consequential damages for breach of contract, which plaintiff admitted the parties never discussed and defendant never expressly promised to pay. Defendant moved for partial summary judgment, arguing that the consequential damages were not contemplated by the parties when they negotiated the relocation agreement. Applying New York law, the court found that New York applies a foreseeability test to the question whether consequential damages are recoverable in a breach of contract action, and found that the lower court erred in limiting consequential damages to those expressly discussed at the time of the contracting. The court held it was reasonably foreseeable that the defendant's failure to promptly pay or reimburse relocation expenses would result in plaintiff having to borrow money to pay for those expenses from some source, resulting in extra cost to him.

Breach of Contract – Stock Options

Miga v. Jensen, 96 S.W.3d 207 (Texas 2002)

The lower court valued stock options as of the time of trial. The Supreme Court reversed, holding that the Texas rule is contract damages are measured at the time of the breach.

Scully v. US Wats.Inc., 238 F.3d 497 (3rd Cir. 2001)

The Court of Appeals for the Third Circuit upheld a District Court ruling that the plaintiff employee was unlawfully deprived of his stock option, when he was denied his attempt to exercise it by a defendant employer that had wrongfully terminated the plaintiff under a two-year employment contract that required cause for dismissal. In an exhaustive discussion of the difference between conversion damages and breach of contract damages in the stock-option context, the appellate court also affirmed the trial court's award of damages based upon the difference between the plaintiff's strike price and the market value of the stock on the day in which the breach occurred (rather than the final day of the contract), stating that no one universal theory could adequately confer the just amount of damages in all cases. The court also rejected the defendant's appellate argument that the damages should have been discounted on the basis of lack of marketability of the shares, because of the difference between restricted and unrestricted stock prices at the time of the breach. The Third Circuit also reversed the lower court's holding that Pennsylvania's Wage Payment and Collection Law did not contemplate stock options which represented potential future compensation, rather than that which had already been earned. The appellate court held that stock options were essentially "call options" that represented an amount of money that was to be paid to an employee under an employment agreement. As such, the plaintiff was entitled to attorney's fees and potentially to liquidated damages, if the employer could not contest or dispute the wage claim in good faith.

Martino-Catt v. E. I. Dupont de Nemours & Co., 213 F.R.D. 308 (S.D. Iowa 2003)

The court held that management employees who relinquished benefits under a severance plan in exchange for stock options failed to state a securities fraud claim based on allegations that the defendants failed to disclose that certain corporate officers, and the defendants generally, interpreted the severance plan as providing an "easy trigger" which amounted to a certain cash payout to each participant.

Wage Collection Laws

Pallone v. Marshall Legacy Inst., 97 F.Supp.2d 742 (E.D. Va. 2000)

The court held that the Virginia Wage Payment Act does not provide for a private cause of action to enforce right to be paid for work performed.

Whiting-Turner Contracting Co. v. Fitzpatrick, 783 A.2d 667 (Md. 2001)

Maryland's wage law (§3-501(c)) provides that wages means "all compensation that is due to an employee for employment" and states that "wage" includes a bonus, a commission, a fringe benefit or "any other remuneration provided for service." Plaintiff, at hiring, was told that his compensation would consist of a weekly salary and, after two years of employment and depending upon the profitability of the company, profit sharing. Before the two years lapsed, plaintiff decided to resign. When he told his supervisor that he had decided to resign, he, being aware that others had received bonus checks, asked about his bonus check. The supervisor said: "I have a profit sharing check for you in my pocket. All you have to do is tell me you are staying." Plaintiff adhered to his decision to resign and the company did not give him the bonus check. The Court of Appeals, in ruling for the employer, emphasized that the statute required the bonus to have been promised as a part of compensation for service. Here, the court held it was not promised and was rather "a gift, a gratuity, revocable at any time before delivery."

Baltimore Harbor Charters, LTD., v. Ayd, 780 A.2d 303 (Md. 2001)

Maryland's wage collection law does not define the term "employee." Plaintiff was President and Treasurer of the corporation. Defendants' Board of Directors agreed to pay plaintiff $576.92 per week for management, consulting and other services as well as for performing his functions as President and Treasurer. Defendant did not do so and plaintiff sued for treble damages and attorney's fees for alleged violation of the Wage Act. The Court of Appeals fashioned a six factor test for determining whether one was an employee and held that whether or not plaintiff was an employee was a jury issue as also was the question whether the treble damages and attorney's fees provision did not apply as "a bona fide dispute" existed between the parties as defined in Admiral Mortgage v. Cooper, 745 A.2d 1026, 1035 (Md. 2000).

Raffaelli v. Advo, Inc., 218 F.Supp.2d 1022 (E.D. Wis. 2002)

Defendant agreed to make severance payments to plaintiff in exchange for plaintiffs' non-compete agreement in the event he was terminated without cause. Defendant, after first making severance payments under the agreement, stated that it had cause for termination and ceased making severance payments. Plaintiff sued for the severance payments under the Wisconsin wage collection law which defines "wages" as remuneration for personal services. The court held that plaintiff's agreement not to compete was an agreement to render personal services, holding that refraining from engaging in an activity was no less a service to defendant than if plaintiff had acted affirmatively. 218 F.Supp.2d at 1026. The court distinguished Dept' of Labor, Indus. & Human Relations v. Coatings, Inc., 376 N.W.2d 834 (Wis. 1985) where the court held that the severance payments were not for personal services as the contract entitled plaintiff to payment if he were terminated without cause and plaintiff did not have to do anything to obtain the benefits. See also Slone v. Aerospace Design & Fabrication, Inc., 676 N.E.2d 1263,

1267 (Ohio 1996) (performance of non-compete agreement is personal service); Schaefer v. Commissioner, 105 T.C. 227, 1995 WL 542395 (1995) (refraining from engaging in competition is equivalent to a personal service).

Medex v. McCabe, 372 Md. 28, 811 A.3d 297 (Md. 2002), vacating McCabe v. Medex, 786 A.2d 57 (Md. App. 2001).

The Court of Special Appeals held that the state wage collection law prohibits an employer from conditioning the payment of commissions, set forth in its commission schedule, upon the employee still being employed on the date of the payment when the employee had completed all of the tasks required of him prior to the conclusion of the fiscal year. The intermediate court went on to hold that there was a bona fide dispute that need not be submitted to the jury. The Court of Appeals vacated that decision, holding that the "incentive fees" were commissions, and thus "wages", as defined by the statute; that contractual language between the parties cannot be used to eliminate the requirement and public policy that employees have a right to be compensated for their efforts; and that the bona fide dispute issue should have been submitted to the jury.

Battaglia v. Clinical Perfusionists, Inc., 658 A.2d 680 (Md. 1995)

The court held that "[t]here is no indication in the statutory language [of the wage collection law] that the terms 'compensation' … or 'remuneration' … are intended to encompass contract damages in which promised wages for future services, not rendered, may enter into the damages computation." 658 A.2d at 685.

Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002)

The court certified to the District of Columbia Court of Appeals the question whether, under District of Columbia law, an architect is barred from recovering on a contract to perform architectural services in the District or in quantum meruit for architectural services rendered in the District because the architect was not licensed to practice in the District.

Lawlor v. District of Columbia, 758 A.2d 964 (D.C. 2000)

The court affirmed judgments under the Wage Collection Act against shareholders and officers of a corporation, whose veil was pierced, for failure to pay employees for services rendered to the corporation.

Scully v. US Wats.Inc., 238 F.3d 497 (3rd Cir. 2001)

The Court of Appeals for the Third Circuit upheld a District Court ruling that the plaintiff employee was unlawfully deprived of his stock option, when he was denied his attempt to exercise it by a defendant employer that had wrongfully terminated the plaintiff under a two-year employment contract that required cause for dismissal. In an exhaustive discussion of the difference between conversion damages and breach of contract damages in the stock-option context, the appellate court also affirmed the trial court's award of damages based upon the difference between the plaintiff's strike price and the market value of the stock on the day in which the breach occurred (rather than the final day of the contract), stating that no one universal theory could adequately confer the just amount of damages in all cases. The court also rejected the defendant's appellate argument that the damages should have been discounted on the basis of lack of marketability of the shares, because of the difference between restricted and unrestricted stock prices at the time of the breach. The Third Circuit also reversed the lower court's holding that Pennsylvania's Wage Payment and Collection Law did not contemplate stock options which represented potential future compensation, rather than that which had already been earned. The appellate court held that stock options were essentially "call options" that represented an amount of money that was to be paid to an employee under an employment agreement. As such, the plaintiff was entitled to attorney's fees and potentially to liquidated damages, if the employer could not contest or dispute the wage claim in good faith.

Breach of Contract – Terms

Brozo v. Oracle Corp., 324 F.3d 661 (8th Cir. 2003)

The court, in reversing the lower court, held that a salesman's contract was not ambiguous insofar as it gave the employer the discretion to accord "appropriate treatment" to any individual sales that equaled or exceeded the employee's annual quota. Finding that language not ambiguous, the court held that the employee could not recover for breach of contract after the employer capped the employee's commission for a large sales transaction. The dissent stated that "[t]his case troubles me as much as any case that I have sat in over thirty-seven years on this court."

Conversion

Mar Tech. Mechanical, LTD v. Chianelli Bldg. Corp., 54 Va. Cir. 569, 2001 WL 1262387 (Va. Cir. Ct. 2001)

Plaintiff brought a conversion action for a sum of money that he alleged should have been paid for work performed. The court denied the claim as a claim for conversion requires that a specific, tangible item is being wrongfully withheld. Here, "any form of payment would satisfy the judgment, and could properly come from any source whatever." Id. at *6. As "a dollar is a dollar" and "no specific dollar is sought as being converted", the claim did not lie.

See also Republic of Haiti v. Crown Charters, Inc., 667 F.Supp. 839, 845 (S.D.Fla. 1987) (a mere obligation to pay money may not be enforced by an action for conversion).

Motion Control Sys., Inc. v. East, 546 S.E.2d 424 (Va. 2001)

The Supreme Court found a restrictive covenant to be overbroad and unenforceable. While the court in prior decisions had approved covenants prohibiting employment in "any business similar to the type of business conduct by" the employer (Roanoke Eng'g Sales Co. v. Rosenbaum, 290 S.E.2d 882, 883 (Va. 1982)) and prohibiting work with a competitor who "renders the same or similar services as Employer." (Blue Ridge Anesthesia & Critical Care v. Gidick, 389 S.E.2d 467, 468 (Va. 1990)), here, the covenant defined a "similar business" in terms that the court found could include a wide range of business unrelated to the plaintiff's employer's business. The court found the covenant to be overbroad even though the employee had specifically negotiated a language change in the offending sentence in the covenant. The court went on to vacate an injunction because there was no evidence that the employee had actually disclosed or threatened to disclose trade secrets, and "[m]ere knowledge of trade secrets is insufficient to support an injunction" under the Virginia Uniform Trade Secrets Act. Id. at 426.

Unfair Business Practices Statute

Cortez v. Purolator Air Filtration Products, Co., 999 P.2d 706 (Cal. 2000)

California courts have held that employment practices forbidden by the Labor Code may also constitute an unlawful business practices subject to redress under the state statute. See also McCullum v. XCare.net, Inc., 212 F.Supp.2d 1142 (N.D. Cal. 2002) (former employee terminated from sales manager position alleged employer failed to pay her certain commissions and court held that plaintiff accordingly had pled a claim under the California statute regarding unfair business practices); Cal-Tech v. Los Angeles Cellular Tel. Co., 973 P.2d 527 (Cal. 1999) (Supreme Court held that a practice could violate the unfair business practices provisions of the code "even if not specifically proscribed by some other law."); Application Group, Inc. v. Hunter Group, 61 Cal. App. 4th 881, 72 Cal. Rptr.2d 73, 13 IER Cases 1366 (BNA) (1998) ("where the employer's policy or practice is forbidden by or found to violate the Labor Code, it may also be held to constitute an unlawful business practice subject to redress under [California Business and Professions Code § 17200].").

Dalton v. Camp, 548 S.E.2d 704 (N.C. 2001)

Supreme Court found that summary judgment was appropriate on employer's claim under the North Carolina unfair and deceptive trade practices statute.

Anti-SLAPP Statute

Commonwealth Energy Corp. v. Chappell, 2002 WL 54669 (Cal.App.4th Dist., Jan. 15, 2002)

Former employee anonymously sent copies of an article about the defendant that had been published in a local newspaper to the defendant's shareholders. Plaintiff stated that he did so to induce the defendants to settle a breach of contract action regarding unpaid commissions and stock options that he had filed. When the defendant traced the distribution of the article to the plaintiff, it filed suit against him on various grounds, including misappropriation of trade secrets (i.e., the shareholder's list). The former employee then filed a motion to strike the employer's complaint under California's anti-SLAPP statute. SLAPP is an acronym for "Strategic Lawsuits Against Public Participation." That statute provides that a lawsuit is subject to dismissal if it arises from "any act of [a] person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue," unless the plaintiff in the lawsuit establishes a probability he will prevail on the claim. The statute imposes no requirement that the defendant, here, the former employee, show an improper motive. The court granted the motion to strike and awarded attorney's fees.

Shareholder claims

Paskowitz v. Wohlstadter, 822 A.2d 1272 (Md. App. 2003)

The Maryland Court of Special Appeals affirmed a lower court dismissal of a shareholder plaintiff's claim under Delaware Law against a corporation and some of its directors for breaching its fiduciary duty by allegedly materially false and misleading disclosures regarding a joint venture. The court held that the plaintiff's suit was derivative rather than direct and that the allegedly misleading disclosures did not affect any individual contractual or voting rights of the plaintiff. The plaintiff could not allege a special injury in his own right, and therefore he had no standing to sue as he did not claim to suffer any actual damages, but only nominal damages based on the allegedly misleading disclosure.

Next Century Communications Corp. v. Ellis, 318 F.3d 1023 (11th Cir. 2003)

The court rejected claims by a former shareholder that he justifiably relied on statements by the company's CEO regarding the company's share price and strong performance, and accordingly found that the shareholder could not state a claim for negligent misrepresentation under Georgia law.

Martino-Catt v. E. I. Dupont de Nemours & Co., 213 F.R.D. 308 (S.D. Iowa 2003)

The court held that management employees who relinquished benefits under a severance plan in exchange for stock options failed to state a securities fraud claim based on allegations that the defendants failed to disclose that certain corporate officers, and the defendants generally,

interpreted the severance plan as providing an "easy trigger" which amounted to a certain cash payout to each participant.

Punitive Damages

Chatman v. Lawlor, 831 A.2d 395 (D.C. App. 2003)

The District of Columbia Court of Appeals affirmed that defendant was liable for her participation in a fraudulent conveyance to co-defendant so that the latter could avoid judgment in a prior trial, but that a defendant's "failing to disagree" with opposing counsel's estimation of her net worth during questioning is insufficient to establish the exact sum of her net worth at time of trial for purposes of punitive damages. The purpose of punitive damages is to punish the defendant, but not to impose "financial ruin" upon her. As such, the case was remanded for determination of defendant's net worth and whether she would be able to afford the $1.4 million punitive damage award for which she was liable.

Preemption

Lucini Italia Co. v. Grappolini, 231 F.Supp.2d 764 (N.D. Ill. 2002)

The United States District Court for the Northern District of Illinois sitting in diversity answered in the negative the question as to whether the preemption clause of the Illinois Trade Secret Act (ITSA), 75 ill. Comp. Stat. 1065/8(a) precluded the plaintiff from claims for breach of fiduciary duty, constructive fraud, fraud, promissory estoppel and unjust enrichment against the defendant. Applying Illinois law, the court found that while the ITSA does preempt all common law causes of action for misappropriation of a trade secret, it does not preempt any claim outside that scope, including all five of the plaintiffs claims which related to the defendant's conduct in contractual negotiations, independent of the misappropriation claim.

Nanda v. Board of Trustees of Univ. of Illinois, 219 F.Supp.2d 911, 916 (N.D. Ill. 2001)

Plaintiff's tortious interference claim relied upon an alleged improper motivation (sex, race and national origin) for defendant's conduct that was prohibited by the state anti-discrimination law. Thus, the court held that the tortious interference claim was inextricably linked to claims of discrimination under the state statute, which had been held in Welch v. Illinois Supreme Court, 751 N.E.2d 1187 (Ill. 2001) to be an exclusive remedy, and the claim is therefore preempted by the anti-discrimination statute.

Martinez v. Cole Sewell Corp., 233 F.Supp.2d 1097 (N.D. Iowa 2002)

The court found that the Iowa Civil Rights Act preempted a claim of intentional infliction of emotional distress. See also Greenland v. Fairtron Corp., 500 N.W.2d 36 (Iowa 1993) (claim for IIED was preempted by Iowa sex discrimination statute).

Jiminez v. Thompson Steel Co., Inc., 264 F.Supp.2d 693 (N.D. Ill. 2003)

The court addressed whether claims for intentional and negligent infliction of emotional distress are preempted by the Illinois Human Rights Act. The court held that whether a tort claim is preempted depends upon whether the claim is inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the act itself.

Ishikawa v. Delta Airlines, 343 F.3d 1129 (9th Cir. 2003)

A plaintiff flight attendant sued a defendant laboratory under state common law in Oregon on the ground that the lab negligently conducted a drug test that ultimately led to the flight attendant's erroneous termination. The jury found for the plaintiff and the defendant appealed on the ground that the state law upon which the plaintiff based her cause of action was preempted by federal law, specifically the Omnibus Transportation Employee Testing Act of 1991. The court affirmed the judgment found that the law did not preempt the state cause of action. There was no express preemption where the preemption clause limited itself to covering only "inconsistent" state law and the defendant made no argument that the state law was actually inconsistent. It is not enough that a state law *could be* inconsistent. Further, the court reasoned that if Congress has expressly preempted some state law, it could not impliedly preempt those state laws that it did not explicitly preempt.

King v. Marriott, 337 F.3d 421 (4th Cir. 2003)

The Fourth Circuit reversed a District Court ruling that ERISA completely preempted a terminated employee's suit for wrongful discharge under the laws of Maryland. While ERISA completely preempts many state law claims, plaintiff's state claim was not preempted by ERISA's provision that provides for a cause of action stemming from termination based upon her testifying in "any inquiry or proceeding relating to" ERISA. An inquiry or proceeding for the purposes of ERISA does not extend to internal complaints filed with defendant employer's co-workers, supervisors, and attorneys. The Fourth Circuit declined to follow the Fifth and Ninth Circuits which had held intra-office complaints to fall within the ambit of ERISA. Further, plaintiff did not waive her right to object to removal by stating an ERISA claim as an alternative argument after her attempt to block removal was denied.

Branche v. Airtran Airways, Inc., 342 F.3d 1248 (11th Cir. 2003)

The Court held that plaintiff's retaliatory discharge claim in violation of Florida's Whistleblower Act was not preempted by the Airline Deregulation Act, including the amendment thereto which included whistleblower protections for airline employees.

Venue

Pope-Payton v. Realty Management Services, Inc., 815 A.2d 919 (Md. App. 2003)

The Court of Special Appeals for Maryland addressed, for purposes of determining whether a trial court's transfer of venue was valid, the question as to "whether discrimination takes place only in the county where the decision to discriminate is made or whether discrimination may also take place in the county where the decision to discriminate was implemented." The trial court in Prince George's County, Maryland, where the plaintiff worked for defendant corporation, transferred the case to Montgomery County where the allegedly discriminatory decision was made at the defendant's headquarters. Noting that allegedly discriminatory decisions and actions do not necessarily take place in the same venue, the court reversed the lower court's transfer and remanded it back to Prince George's County on the basis of an agglomeration of factors including the fact that (1) the plaintiff worked and lived exclusively in the county where the suit was filed, (2) the discriminatory effect was felt in the venue chosen by the employee, and (3) the ordinance under which the employee brought a claim was the law of the county where she originally brought suit, and (4) the fact that all allegedly discriminatory decisions were implemented in Prince George's County.

Blake v. Professional Travel Corp., 768 A.2d 568 (D.C.C.A. 2001)

In a sexual harassment claim under the District of Columbia Human Rights Act (DCHRA), the District of Columbia Court of Appeals reversed a trial court decision to dismiss the case on the ground of forum non conveniences. The lower court's had reasoned that Virginia was a more appropriate venue because the state had closer ties to the litigation, the business of the defendant in the District of Columbia was limited as compared to that in Virginia, the corporate decisions surrounding the harassment occurred in Virginia and Colorado, the plaintiff's job took place primarily in Virginia, and the forum would not be inconvenient for the plaintiff. The appellate court rejected this reasoning as an abuse of discretion stating that numerous acts of sexual coercion and harassment had occurred in the District of Columbia, that the defendant had a corporate presence in the District, that the employee of the defendant allegedly committing the harassment lived in the District, and the defendant's failure to show any real inconvenience in litigating the case in the District.

Employer's Liability for Actions of Employee

Murdza v. Zimmerman, 786 N.E.2d 440 (N.Y. 2003)

New York's highest court held that an employer cannot be held liable for injuries to a pedestrian that occurred when an employee's boyfriend was driving a car leased to the employer.

Carter v. Reynolds, 815 A.2d 460 (N.J. 2003)

The New Jersey Supreme Court held that an accounting firm can be vicariously liable for an auto accident allegedly caused by the employee returning home from a mandatory client visit in her personal car.

O'Toole v. Carr, 815 A.2d 471 (N.J. 2003)

The New Jersey Supreme Court held, on the other hand, that a law firm cannot be held liable for an auto accident caused by a partner driving to his part-time job as a municipal judge.

Leach v. Heyman, 233 F. Supp. 2d 906 (N.D. Ohio 2002)

The Northern District of Ohio held that a convenience store could be held liable under Ohio law where its employee acted with racial animus towards a customer. The court further held that while an employer can be held liable for an employee's intentional and/or malicious acts, such acts must be within the scope of employee's employment, and that an employee's leaping over the counter and assaulting a customer as he is about to leave the store does not fall within that scope.

Sexual Harassment

Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511 (Cal. Ct. App. 2nd 2004)

The California Court of Appeal held that the writers for the television show "Friends" who had been sued by a writers' assistant for sex harassment based upon the sexually explicit talk at writers' meetings could defend on the ground that these sexually explicit conversations were "creatively necessary". The court stated: "[T]o the extent defendants can establish the recounting of sexual exploits, real and imagined, the making of lewd gestures and the displaying of crude pictures denigrating women was within 'the scope of necessary job performance' and not engaged in for purely personal gratification or out of meanness or bigotry or other personal motives, defendants may be able to show their conduct should not be viewed as harassment…"

Haynie v. State, 664 N.W.2d 129 (Mich. 2003)

The Michigan Supreme Court affirmed summary judgment for the employer, holding that gender-based harassment of an employee that is not sexual in nature cannot support a claim of sexual harassment. The court stated: "it is clear from this definition of sexual harassment [in this state's civil rights act] that only conduct or communication that is sexual in nature can constitute sexual harassment, and thus conduct or communication that is gender-based, but that is not sexual in nature, cannot constitute sexual harassment." There was a vigorous dissent.

Administrative Hearings

State of Maryland Comm'n on Human Relations v. Freedom Express/Domegold, Inc., 825 A.2d 354 (Md. 2003)

The Maryland Court of Appeals reversed a lower court order that the Maryland Commission on Human Rights hold an "evidentiary hearing to determine whether a sufficient basis existed" for the treatment of four corporate entities as integrated, thereby constituting a single employer for the purposes of the Commission, which only had jurisdiction over employers with over fifteen employees. The defendant-employer refused to adequately comply with a subpoena from the Commission and the Commission filed a petition in Maryland Circuit Court to enforce the subpoena. The highest court in Maryland granted certiorari directly from the circuit court, holding that the trial court erred in compelling the evidentiary proceeding, since no final administrative decision had been reached in the matter. The statutory interpretation as to whether the defendant was an "employer" for the purposes of the commission was "a typical statutory interpretation or application issue to be determined by a final administrative decision and to be judicially reviewed in an action under the [state] Administrative Procedure Act…." Unless a tribunal is acting "palpably without jurisdiction" as in Parker v. State where "a probate court, invested only with authority over wills and the estates of deceased persons" attempted to subject an individual to a criminal trial, judicial review of the jurisdictional issue "must await a final administrative decision."

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