

Recent Case Law Updates

By Paul F. Evelius

In *National Instrument, LLC v. Braithwaite*, the Circuit Court for Baltimore City has held ruled that (i) where a corporate merger occurs, the successor company may enforce a covenant not to compete between its predecessor and an employee if there has been no change in the employee's duties and obligations as a result of the merger and/or the employee fails to object to the merger and continues to accept the benefits of employment and (ii) a restrictive covenant whose geographic scope is North America and Mexico is enforceable if the employer's "relevant market" encompasses that area.

In *College Bowl, Inc. v. Mayor & City Council*, the Maryland Court of Appeals has ruled that neither the law of inverse condemnation, nor a Maryland statute which entitles a company to recover from a government agency relocation expenses incurred as a direct result of that agency's notice of intent to acquire that company's property, enabled a company to recover certain business relocation expenses, since those expenses had not, given the undisputed facts, resulted directly from government conduct.

In *Action Tapes v. Mattson*, a federal appeals court has ruled that a computer-program-copyright owner who fails to properly register that copyright with the United States Copyright Office cannot bring a claim for copyright infringement under the Computer Software Rental Amendments Act of 1990, which, in an effort to protect owners of copyright in computer programs, prohibits a person in possession of "a particular copy of a computer program" from disposing of that copy for commercial gain "by rental, lease or lending" without authorization of the copyright owner.

In *Murphy v. United States*, a federal appeals court, in a controversial ruling which conflicts with rulings of other federal courts and the position of the Internal Revenue Service, has held that, under the Sixteenth Amendment to the U.S. Constitution, damages which a taxpayer receives as compensation for emotional distress and loss of reputation in a lawsuit against her former employer are not taxable (to the extent they are not related to lost wages or earnings) and that section 104(a)(2) of the Internal Revenue Code is unconstitutional to the extent that it fails to exclude such damages from taxable income.

In *ShoMe Technologies, Inc. v. Nobska Group, LLC*, Maryland's federal district court, applying Maryland law, has ruled that ShoMe could not viably sue Nobska for negligent misrepresentation based on the latter's failure to enter into a license agreement which ShoMe and Nobska had been discussing, because a letter of intent between the companies stated that it did not "create any legal obligations on the part of" any party, thus negating the notion that Nobska owed ShoMe any legal duty on which a negligent misrepresentation claim could be based.

In *Koch v. SCS*, Maryland's federal district court has addressed various attorney-client-privilege issues arising in the context of currently-pending corporate litigation in which Koch claims that various parties wrongfully deflated the purchase price of his stock ownership in SCS.

The court has held, among other things, (i) that under the "crime-fraud" exception to the attorney-client privilege, Koch is entitled to obtain from the defendants certain documents that were otherwise protected by the privilege, because they were prepared in furtherance of a scheme to employ advice of counsel to falsely portray Koch's departure from SCS's employ as a resignation rather than a termination without cause, and (ii) that under the circum-

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Jason R. Potter, Esquire, joins the Construction Law Practice of Wright Constable & Skeen, L.L.P.



Wright, Constable & Skeen is pleased to announce that Jason R. Potter has joined the Firm as an Associate in the Firm's Construction Law and Litigation practice areas.

Jason is a graduate of The Ohio State University (B.A. 1995, Political Science) and the University of Baltimore School of Law (J.D., 2005), where he also earned the "Clinical Excellency Award" (2004-2005). Jason clerked for The Honorable Thomas E. Marshall, Circuit Court for Harford County (2005-2006), and was admitted to the Maryland Bar in December, 2005.

The Construction Law Group of WC&S represents contractors and subcontractors, owners, sureties, architects and engineers and other participants in the construction industry in all matters, from bidding and contract negotiation through claim prosecution and defense. The Construction Law Group also assists clients with some of the more technical issues in construction, including overseeing patent applications for construction techniques. The Construction Law Group attorneys have also assisted in the drafting of and lobbying for legislation beneficial to clients in the construction industry, including Maryland's immunity statute and requirement for a certificate of merit.

As a full service law firm, WC&S can meet the full range of legal needs of its construction industry clients, including corporate and business, labor and employment, general business planning and organization, bankruptcy, tax, family law, and estate and succession planning, in addition to construction law. **WCS**



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stances before the court, Koch cannot rely upon, and is required to return to the defendants, a privileged document which the defendants inadvertently disclosed to Koch and the court.

In *Corporate Healthcare Financing, Inc. v. BCI Holdings Co.*, Maryland's federal district court, in the course of granting a preliminary injunction to a company seeking enforcement of a covenant not to compete, has provided guidance regarding the principles which govern such determinations and endorsed the notion that where the parties to a non-competition covenant "engage in business nationally, and the restrictive covenant delineates its coverage by former customers rather than by geographic area," the covenant can reasonably be applied nationally. 

Wright, Constable & Skeen, LLP is proud to announce

... that Robert W. Hesselbacher, David W. Skeen and Mary Alice Smolarek have been selected as *Maryland Super Lawyers* for 2007. Five percent of Maryland attorneys receive this honor each year. Additionally, David Skeen is again listed in the *2007 Best Lawyers in America*. Mr. Skeen has been recognized in this manner since 1989 for prominence in admiralty practice. Mr. Skeen is now also recognized for his practice in Alternate Dispute Resolution. 

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SUPREME COURT EXPANDS EMPLOYERS' DUTY TO TURN THE OTHER CHEEK

By Monte Fried



Monte Fried is the Managing Partner of Wright, Constable & Skeen, and can be reached at (410) 659-1302 direct dial, or at mfried@wcslaw.com. Mr. Fried's practice is concentrated in the areas of employment and labor law and health care law.

Most employers know that Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on an individual's race, color, religion, sex, or national origin. However, some employers are unaware that implementing employment policies and actions which don't discriminate against employees or constitute sexual harassment is only half of their legal obligation under Title VII. The other half is to "turn the other cheek" and **not** take retaliatory actions against those employees who have made claims of discrimination, even when the claims are embarrassing and determined to be false.

Regardless of the validity of an employee's discrimination claim, Title VII prohibits an employer from discriminating against an employee or job applicant because that person "has opposed any practice" prohibited by Title VII or because that person "has made a charge,

testified, assisted, or participated" in a Title VII investigatory proceeding or hearing. This summer, the Supreme Court of the United States decided *Burlington Northern & Santa Fe Railway Co. v. White*, in which it expanded the types of actions which can constitute a violation of Title VII's anti-retaliation provisions. This decision will have a significant impact on

Maryland employers.

Prior to *Burlington Northern*, employers in Maryland and other states within the Fourth Circuit benefited from a narrow definition of the types of acts which could constitute actionable retaliatory conduct under Title VII. Even though an employee could establish that he had engaged in activity protected under Title VII and that there was a causal connection between that activity and the conduct of the

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employer which were claimed to be retaliatory, these actions would not constitute a violation of the anti-retaliation provisions unless they had “an adverse effect” on the ‘terms, conditions or benefits’ of employment.” *Von Gunten v. State of Maryland*, 243 F.3d 858, 866 (4th Cir. 2001). Other circuit courts of appeals had adopted an even more limited definition of the type of acts which could constitute retaliation, confining them to those which involved decisions made in the areas of hiring, granting leave, discharge, promotions and/or compensation. In essence, these courts, including the Fourth Circuit, held that the types of actions that were prohibited by the anti-retaliation provisions were limited to acts which concerned employment decisions and the workplace. On the other hand, some courts were not as restrictive and held that any act which would dissuade a reasonable worker from making or supporting a charge of discrimination could constitute illegal retaliation.

In *Burlington Northern*, Brenda White, the only female working in the Maintenance of Way Department at Burlington’s Tennessee Yard, claimed that she was retaliated against in violation of Title VII after she had complained about insulting and inappropriate remarks made to her by her supervisor in the presence of other male employees. She claimed (and convinced a jury) that Burlington subsequently retaliated against her by reassigning her from forklift operator duties to other less desirable duties within her job classification; by placing her under surveillance and monitoring her daily activities; and by suspending her without pay for 37 days because she was allegedly insubordinate. Although some of the claimed retaliatory acts arguably satisfied both the broad and narrow definitions of a retaliatory action, the Supreme Court decided to eliminate the differing definitions among the federal courts.

The Court rejected the more restrictive approach taken by the Fourth Circuit and other circuits, and held that Title VII’s anti-retaliation provisions extend beyond just workplace-related or employment-related retaliatory acts and harm. The Court stated that an employer sometimes retaliates against an employee by taking actions not directly related to his employ-

ment or by causing him harm outside the workplace. As examples, it pointed to a lower court decision in which retaliation was found where the FBI, contrary to its established policy, refused to investigate death threats made against an agent and his wife, and another case where retaliation was found when an employer filed false criminal charges against a former employee who had complained about discrimination. The Court felt that limiting the scope of those acts which could constitute retaliation under Title VII would interfere with fully achieving the purpose of the anti-retaliation provisions – unfettered access to Title VII’s statutory remedies.

The *Burlington Northern* Court also defined the level of seriousness to which such acts or harm must rise before actionable retaliation exists. The Court held that an employee must show that a “reasonable employee” in the same circumstances would have found the challenged action to be “materially adverse,” which means the action “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” The Court noted that it used the word “material” to separate significant from trivial harms, and that an employee’s complaint of discriminatory behavior does not immunize that employee from the petty, slight or minor annoyances that often take place at work, such as sporadic use of foul language, occasional teasing, personality conflicts, etc. However, the Court acknowledged that the standard it has set has deliberately been phrased in general terms because the significance of any given act of retaliation often depends upon the particular circumstances, and “context matters.” Therefore, an act which could be immaterial in some situations might be material in others.

Possibly, a conservative court like the Fourth Circuit may attempt to offset the expanded definition of retaliatory acts by using the factual “context” to minimize the “materially adverse” effect of a claimed retaliatory action. Nevertheless, as a result of *Burlington Northern*, it is reasonable for Maryland employers to expect that there will be an increase in the number of retaliation charges brought by employees, as well as an increase in the number of such cases that will end up going to a jury.

Employees who complain of discrimination have often been vocal in the workplace and regularly add a retaliation claim to their discrimination complaints; the expanded types of acts which can constitute retaliation will allow them to broaden their claims. Moreover, since *Burlington Northern* expressly recognizes that employees can be subject to retaliation in ways which are subtle and not directly related to the terms and conditions of their employment, one can envision a “creative” employee claiming retaliation because his employer barred him from a social club, subjected him to more or less supervision than other employees, changed his hours of work, moved his parking space, etc.

While no one can lawfully stop an employee from filing a retaliation complaint, certain actions can be taken by employers to reduce their exposure to liability. First, all performance problems with employees and contemplated disciplinary actions should be documented as they occur, and written performance evaluations should be conducted on a regular basis. The preparation of such documentation prior to an employee’s complaint of discrimination – in addition to demonstrating a legitimate non-discriminatory reason for any initial employment action which is taken – will evidence that any subsequent write-ups and disciplinary action were not motivated by retaliation but were premised upon the employee’s unacceptable performance which began before he complained of discrimination. Second, managerial employees repeatedly should be reminded of Title VII’s anti-retaliation provisions at employment discrimination training sessions/seminars and whenever a charge or complaint has been made against a manager. Finally, before implementing job decisions or actions which affect an employee who has complained of discrimination, the contemplated decision or action should be reviewed by the human resources department or outside counsel to make sure it does not lend itself to a claim of illegal treatment. While employers understandably may not like it, they will have to turn the other cheek – it’s the law! **WCS**

MOLD: MORE THAN A BATHROOM PROBLEM

By Louis J. Kozlakowski, Jr.

Mold contamination has become one of today's hot topics. Molds have been on the Earth for millions of years. Some molds are beneficial, like those that decompose leaves, wood and other plant debris. And what would we do without cheese for that hamburger or penicillin for an illness?

The problem arises when mold starts digesting organic material like our homes or buildings. To grow, mold needs to consume water and organic material (like wood, food or fabric). So we should not be surprised when we find mold in our bathrooms and refrigerators. Of course, there are a number of available cleaning products which will eliminate even the toughest "science experiment" left in the refrigerator by our children.

The worst place mold can grow, however, is inside wall cavities or other concealed areas, where it can feed on wood, ceiling tiles or even the paper backing of sheet rock. The source of moisture is often a leaky roof, high humidity, pipe leaks, or flooding. The way to control mold growth, then, is to control moisture.

There are two issues, which need to be discussed about mold: property damage and health.

On the property damage side, mold is normally excluded from standard homeowners and commercial property policies. Mold contamination is covered only if it is the result of a covered incident, such as a burst pipe. But mold caused by excessive humidity is a maintenance issue for the property owner, similar to termite or mildew prevention, and is not covered. The most effective way to treat mold is to immediately correct underlying water damage and clean the affected area. One of the more common methods used to clean mold is a solution of bleach and water.

An individual can generally handle the clean up, if the area is small and well defined. However, if the mold problem is extensive, such as between walls or under floors, a professional should be consulted.

The majority of common molds are not a concern to someone who is healthy. However, some people are sensitive to



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molds and may be at risk for infection from them. Further, some molds produce toxins in defense against other molds and bacteria called mycotoxins. These mycotoxins may cause toxic effects in people. You should consult your physician if you believe that you or your family members have a health problem caused by exposure to mold.

You may recognize mold growth by sight or smell. Are the walls or ceilings discolored, or do they show signs of water damage? Do you smell a bad or musty odor? Remember, hidden mold can be growing behind wall coverings or ceiling tiles.

To learn more about preventing mold

in your home, see the U.S. Environmental Protection Agency (EPA) publication, *A Brief Guide to Mold, Moisture, and Your Home*. This publication is available at www.epa.gov/iaq/molds/moldguide.html.

If you believe you are ill because of exposure to mold in the building where you work, you should first contact your health provider to protect your health. Notify your employer or union representative so that your employer can act to clean up and prevent mold growth. If you feel your children are ill because of exposure to mold in their school, first consult their health care provider to determine the appropriate action to take. Then contact the school's administration to express your concern and to ask that they remove the mold. To find out more about workplace and school safety and health guidelines, read the EPA's publication, *Guidelines, Mold Remediation in Schools and Commercial Buildings*. This publication is available at www.epa.gov/iaq/molds/mold_remediation.html.

Finally, remember to fix any leaks in your home's roof, walls, or plumbing as soon as possible so mold does not have moisture to grow. Clean up and dry out your home thoroughly and quickly (usually within 24 to 48 hours) after any water intrusion such as flooding, roof leaks, etc.

WCS

ANNOUNCEMENT

David W. Skeen has recently announced his retirement as Chairman of the Drug Treatment Court Coordinating Committee for Baltimore City. Mr. Skeen served as Chair of the Committee for over 12 years. The Committee consists of representatives of the bench of the Circuit Court and District Court, the State's Attorney, the Public Defender, Maryland's Division of Parole & Probation, Baltimore Substance Abuse Systems and other agencies involved in the process of diverting non-violent criminal offenders into intensive drug treatment in order to address their addiction problems that generate so much crime in Baltimore City.

The program has access to over 800 treatment slots. The one-year treatment program provides for intense judicial and agency monitoring of performance as well as efforts to improve housing and employment opportunities.

Mr. Skeen's involvement began as President of the Bar Association of Baltimore City (1990-1991) and the Bar Association has continued to support the Drug Treatment Court ever since. More recently, the Treatment Based Drug Courts have begun in other Maryland jurisdictions. Now the Administrative Office of the Courts in Maryland is providing funding and supervision statewide, including Baltimore City. **WCS**

ELECTRONIC THIEVERY OF EMPLOYEES - CAN EMPLOYERS TURN TO THE COMPUTER FRAUD & ABUSE ACT?

By Paul F. Evelius



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In this electronic age, virtually every employer is vulnerable to the shocking discovery that, before resigning, a former employee has accessed computerized information and sabotaged or stolen it. Companies facing this scenario have in recent years turned to the federal Computer Fraud & Abuse Act (the "CFAA" or the "Act") for relief. The CFAA enables a company to bring a civil claim against a person who has sabotaged or stolen its electronic information by accessing its computer system without authorization. (It also imposes criminal penalties on such persons.) Unfortunately, the courts have reached conflicting decisions as to whether employers can obtain relief under the CFAA from employees who use computer access to sabotage or steal proprietary information.

In *International Airport Centers v. Citrin*, a federal appeals court in Illinois sided with employers. The employer in that case, IAC, a real estate company, hired Citrin to identify attractive properties and lent him a laptop to record data about them. Citrin later decided to quit IAC, but before returning the laptop, he deleted from it not only information he had compiled regarding properties, but also evidence of certain of his own prior misconduct. IAC sued Citrin under the CFAA, claiming that he had accessed its computer system without authorization and damaged its data. In defense, Citrin argued that, at the time he accessed the computer, he was still an IAC employee authorized to access all information stored in its computers. In an opinion authorized by influential jurist Richard Posner, the appeals court rejected Citrin's position, reasoning that his decision to destroy the information constituted a breach of fiduciary duty which effectively terminated the agency relationship between IAC and him, thereby ending his authority to access IAC's computers. Other courts have adopted similar reasoning, thus encouraging companies to invoke the CFAA against computer-abusing employees.

Just last month, however, a federal judge in Florida expressly rejected the

notion that an employee's subjective decision to act disloyally somehow automatically revokes his or her authority to access company computers. In that case, *Lockheed Martin Corp. v. Speed*, three Lockheed employees copied trade secrets from the company's computer system shortly before resigning to join a competitor. Like the defendant in the *Citrin* case, they argued that they could not be held liable under the CFAA, because, at the time they accessed the computer system to copy the secrets, they were Lockheed employees whose access was fully authorized. The court agreed, concluding that the plain language of the CFAA supported their position. Notably, in *Int'l Ass'n of Machinists v. Werner-Matsuda*, Judge Deborah Chasanow of Maryland's federal district court in late 2005 reached a similar con-

clusion, holding that a union employee could not be held liable under the CFAA for copying information from his employer's computer system for the benefit of a rival union. According to Judge Chasanow, the language of the CFAA does not "proscribe authorized access for unauthorized or illegitimate purposes." Judge Chasanow so ruled even though the culprit there had signed a personnel policy which stated that she would not access her employer's computer system for purposes contrary to its interests.

Over the next several years, other courts – and perhaps ultimately the U.S. Supreme Court – will reach and hopefully definitively resolve the confounding "authority" issue surrounding CFAA claims. In the meantime, employers should consider measures which might protect them against the reasoning of the Florida and Maryland courts. While one such measure may be the adoption of computer-policy language which expressly states that computer-access authorization does not extend to conduct adverse to company interests, Judge Chasanow's opinion suggests that even such policy language may not salvage an otherwise futile CFAA claim. In any event, companies and their counsel should closely monitor future court decisions interpreting the CFAA's "authority" provision, as they will determine the Act's potency in the war against employees' electronic villainy. **WCS**

Similar to what you will see on the following pages,

Wright, Constable & Skeen, LLP

periodically publishes an online update of recent cases affecting businesses in Maryland. If you are interested in receiving these please send your e-mail address to Paul Evelius at

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